UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, affiliated with UNITE HERE INTERNATIONAL UNION, Petitioner, v. TRUMP RUFFIN COMMERCIAL, LLC, d/b/a TRUMP INTERNATIONAL HOTEL LAS VEGAS, Employer.	Case No. 28-RC-153650

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

TRUMP RUFFIN COMMERCIAL, LLC,
d/b/a TRUMP INTERNATIONAL HOTEL
LAS VEGAS

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TRUMP RUFFIN COMMERCIAL, LLC, d/b/a TRUMP INTERNATIONAL HOTEL LAS VEGAS ("Hotel" or "Employer"), by its attorneys and pursuant to Section 102.69(c)2, 102.67(e) and (i)(1) of the Board's Rules and Regulations, hereby submits its Request For Review of the Regional Director's Decision and Certification of Representative ("DCR").

PROCEDURAL BACKGROUND

On December 4 and 5, 2015, 523 housekeeping, guest services, and food and beverage employees of the Hotel voted whether to be represented by Local Joint Executive Board of Las Vegas ("Petitioner" or "Union"). The election was very close, with a swing of approximately 3% of voters determining the outcome – 2% if challenged ballots voted for Employer. Out of 456 valid and challenged votes cast, 238 employees voted for the Union, 209 employees voted for the Employer, and nine votes were challenged. The election was the culmination of an organizing drive that dated back to at least June 2014, followed by a representation petition filed on June 5, 2015, and an initial election date of June 25-26, 2015, that had been postponed.

Employer timely filed 15 election objections. After 16 days of hearing, Employer withdrew Objections 3 and 5. On February 18, 2016, the Hearing Officer ("HO") issued her Hearing Officer's Report on Objections ("HOR") in which she recommended overruling the remaining 13 objections. After Employer and Petitioner filed exceptions, on March 21, 2016, the Regional Director ("RD") issued his DCR agreeing completely with the HO. This Request for Review as to Objections 1-2, 4, 6-10, 13-14, the failure to address the TCPA violation and the refusal to enforce the subpoena, follows.

SUMMARY OF ARGUMENT

It has long been held that during a representation election the Board must provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of employees. This standard was not met here, as the election was anything but free and fair. During the critical election period, Petitioner Committee Leaders, organizers, and supporters engaged in a wide-range of misconduct, which must be analyzed in terms of their cumulative effect, and which interfered with the employees' freedom of choice in the election.

Employees were threatened with termination, layoffs, lack of protection, and lack of representation if they did not support Petitioner. Employee organizing Committee Leaders photographed and videotaped anti-Petitioner employees without explanation, and threatened two with arrest and another with being reported to OSHA. The day before the election, a Committee Leader almost completely tore down an official government settlement posting right outside the Employee Dining Room ("EDR"), left it hanging there for all to see, texted a photo of it to the Union, and showed the photo to co-workers. Committee Leaders repeatedly questioned employees as to their Union sympathies, noted which employees were opposed to the Union and, in the weeks before the election, sought employees to commit to vote for the Union and declare

when exactly they would be voting. During the election itself one Committee Leader serving as an observer flaunted Board instructions by, among other acts, directing employees how to vote. Other Committee Leaders and pro-Petitioner supporters stationed themselves 31 feet away from the polls in the elevator landing to surveille employees as they voted.

Despite this activity, and the closeness of the election, the HO/RD found no objectionable conduct. In so doing, they errantly found that Committee Leaders were not Petitioner agents and thus applied a third party misconduct standard. The HO/RD came to this conclusion by applying an overly strict "sole and exclusive contact" test for agency, a test contrary to Board precedent, and inconsistent with the legal principle that a person will be deemed a principal's agent where apparent or actual authority exists.

Under the test as applied by the HO/RD, it is basically impossible for any employee organizer to ever be a union agent. Further, the HO/RD further failed to recognize the extensive facts showing that the Leaders were agents under the proper "all the circumstances" test. In this regard, the way in which the Union used the Committee Leaders would reasonably lead employees to believe that they were acting as the Union's agent: Committee Leaders were the primary conduits for communication between the Union and other employees, did the vast majority of organizing, obtained the majority of authorization cards and petition signatures, were primarily responsible for answering employee questions, were promoted by and held out as being tied to the Petitioner, met with Petitioner weekly to get direction and report on their progress, and served as the Petitioner's "eyes and ears." Any direct access Petitioner was able to attempt was due to their efforts. Under Board law they were agents.

The application of a third party standard instead of a party standard for misconduct was further compounded by several errors. For example, the HO/RD took into account subjective

evidence under tests that were objective, despite repeatedly sustaining objections to Employer questions that would have elicited subjective evidence (while permitting Petitioner to ask such questions). Similarly, HO/RD, contrary to the Board's longstanding application of *Passavant* to union misconduct, found that Employer's actions "cured" any Petitioner misconduct. The HO/RD also failed to consider evidence as a whole and instead reviewed each objection and witness, for that matter, in a vacuum, thus failing to credit the integrated pattern of misconduct and dissemination which existed.

The HO/RD further misapplied Board precedent on credibility, and ignored clear evidence demonstrating the credibility of Employer witnesses over Petitioner witnesses. While the RD cloaked his deference to the HO on *Standard Dry Wall Prods.*, the clear preponderance of the evidence standard does not apply where credibility determinations are not based on witness demeanor. Here, among other issues set forth herein, the HO: (i) specifically (albeit in a limited fashion) only addressed the witness demeanor of 3 of 44 witnesses; (ii) credited the lack of knowledge or recall of witnesses (*i.e.*, non-testimony) over clear testimony; (iii) disparately and without explanation decided when to discredit witnesses for lack of specificity or recall; (iv) failed to consider much less address the credibility issues of Petitioner witnesses providing contrary testimony or explaining how it was she resolved conflicting testimony; (v) indirectly and on some occasions directly credited Committee Leader Carmen Llarull, a witness with no credibility whatsoever; and (vi) failed to consider the weight of the evidence of misconduct and corroborative testimony. Even under a deferential review standard, the HO's credibility rulings are fatally flawed.

When it comes to the specific objections, the RD/HO generally understated the nature of the misconduct, downplayed its severity, minimized the dissemination, and then errantly

determined the conduct was not objectionable under the third-party (and also in many cases a party) standard. In brief, the RD/HO erred on Objection 1 by failing to recognize that a new hearing is warranted when Petitioner's observer tells two employees "left, left," as in vote for the Union, hugs another employee, and constantly checks her cell phone. Even under the RD/HO's minimized facts of the misconduct at issue (one time, and only a hug), the conduct is a sufficient attack on the integrity of the election process to warrant a new election. Similarly, as to Objection 2, Committee Leaders and pro-Petitioner supporters stationed themselves at a choke point -- the elevator landing -- 31 feet away from the polling area and surveilled employees exiting to vote and leaving from the polls. Despite the RD/HO's attempts to minimize this conduct, the fact remains that courts recognize such conduct as objectionable and the Board itself recently granted review of a similar situation in *Baker DC LLC*.

Objections 4 and 13 address the Committee Leaders' repeated photographing, videotaping, and threats/appearance of photographing/videotaping, without legitimate explanation, of anti-Petitioner employees -- many of whom were engaged in protected concerted activities at the time. On two occasions, Committee Leaders also threatened employees, once with arrest and once with being reported to OSHA. Such conduct is clearly objectionable under *Randell Warehouse of Arizona (Randell II)*, and recent Board cases on employee rights to photograph have not overruled it. Yet neither the HO nor the RD specifically addressed this precedent. Under *Randell II*, unless overruled, these objections should have been sustained.

Objections 7-9 address the litany of threats made by Committee Leaders, Union Organizers, and pro-Petitioner supporters. Numerous employees were threatened with termination, layoffs, lack of protection, and/or lack of representation and Union-negotiated benefits if they did not support Petitioner. Such conduct is objectionable, and many of the

threats were made by Committee Leader Llarull, a witness with no credibility whatsoever. Yet the RD/HO errantly decided the Employer's witnesses were not credible, the incidents were not sufficiently serious, the threats were not sufficiently disseminated and/or were "cured" by the Employer, and/or the threats were irrelevant given employees' subjective knowledge. Moreover, even assuming it occurred, the Committee Leader misconduct was insufficient given the third party standard. Yet as addressed above the RD/HO's findings as to these were flawed. Under either standard these objections should have been sustained.

Objections 6 and 10 address, respectively, Committee Leaders noting and recording which employees supported the Employer, and Committee Leaders and others soliciting employees in the weeks before the election to sign a sheet committing to vote for the Union and setting forth what time and day they would be voting. Looked at in strict isolation, as done by the RD/HO, current Board precedent would support a finding that such conduct, even by a party, was not objectionable. But this conduct here occurred in the midst of ongoing threats and intimidation, photographing and videotaping of anti-Petitioner employees, unending solicitation, and the positioning of Committee Leaders to observe voters. In this case, the polling and the solicitation of commitments to vote Union and at a particular time are violative. Moreover, Employer respectfully submits that if Board law is that such conduct is not violative under these circumstances, it should be. The historical double-standard between employer and union conduct should not apply, especially in this case.

Objection 14 concerns Committee Leader Llarull's deliberate, almost complete tear-down of a ULP settlement agreement notice, her photographing her work, and her sending it to the Union and sharing it with co-workers. While the HO was not concerned that this action undermined the purposes of the notice with its impact on employees, and the RD simply got

confused as to what happened, the Board should not tolerate such misconduct. Llarull's actions created the impression that Employer did not respect their rights, completely disregarded and had contempt for the law, and that they needed the Union to protect them. This issue is a novel issue, and the Board should step in to declare that such conduct is objectionable.

Lastly, Employer objects to two other matters. First, Petitioner produced a witness who basically admitted the Union, in violation of the Telephone Consumer Protection Act ("TCPA"), used the *Excelsior* list to text employees without their permission. Despite this issue newly coming to light, the RD refused to hear this objection given the seven day filing period and his lack of authority to extend the time for filing objections. In so doing, the RD ignored longstanding precedent empowering RDs to consider newly discovered unlawful activity given the primary objective of the Board is to make certain that elections are conducted fairly and properly. The RD should have done so here, especially given Petitioner's illegal use of otherwise confidential information produced under the Board's new Rules. Moreover, the Board also should address this issue to: (i) clarify how its precedent on new evidence applies under the Board's new election rules; and (ii) declare that the misuse of the new *Excelsior* lists by violating the TCPA, an issue of first impression, is grounds for overturning an election.

Second, the HO/RD erred by refusing to enforce Employer's modified subpoena request for any and all photos/videos in the Union or Committee Leader Llarull's possession depicting anti-Petitioner employees in the three weeks prior to the election. The RD and HO has turned Board practice and court precedent on its head by declaring that subpoenaed evidence is only relevant if the requesting party has already proven the incident happened without the evidence. Employer alleged Committee Leaders took photos and videos; it should not have been limited

only to those photos and videos of which it already knew. This was a prejudicial error depriving Employer of the ability to prove its case.

Whether under a party agency test or a third party conduct test, Employer's election objections should have been sustained. The Board should review the DCR.

BASIS UPON WHICH REVIEW IS BROUGHT

The Employer is filing this Request for Review on the basis that:

(1) The Regional Director's decision raises substantial issues of law and policy because it departs from officially reported NLRB precedent;

(2) There is an absence of precedence under the new election Rules addressing evidence of illegal activity that comes to light during the course of a hearing and the extent to which the Regional Director can and should address this misconduct;

(3) The Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of Employer, a party to the proceeding;

(4) The refusal to enforce Employer's subpoena *duces tecum* constitutes prejudicial error; and

(5) There are compelling reasons for reconsideration of Board rules and policies.

ANALYSIS

I. THE RD ERRED IN FINDING COMMITTEE LEADERS WERE NOT AGENTS

The RD's conclusion that there was no objectionable conduct is in large measure based upon his finding that Committee Leaders were not agents. The RD came to this conclusion by applying an overly strict "sole and exclusive contact" test for determining agency, a test contrary to Board precedent and inconsistent with the legal principle that a person will be deemed a principal's agent where, as here, apparent or actual authority exists.

1. Summary

The Employer put forth significant evidence demonstrating that Committee Leaders were Petitioner's agents by virtue of the apparent authority the Union had conferred on them, which is

the inevitable conclusion when the proper "all of the circumstances" test is applied. In this regard, the way in which the Union used the Committee Leaders over the course of the election campaign would reasonably lead other bargaining unit employees to believe the Committee Leaders were acting as the Union's agents, which the Union should have realized.

As considered more fully below, the record clearly reflects that the Union used Leaders as the primary conduit for communications between the Union and other employees. Committee Leaders did the vast amount of organizing on behalf of Petitioner, obtaining the majority of authorization cards and petition signatures. Committee Leaders were primarily responsible for answering employee questions, as the Union expressly told eligible voters that if they had any questions they should ask the Committee Leaders for answers. Committee Leaders were promoted by and held out as being tied to the Union. Petitioner met with Leaders on a regular basis to give them direction and hear what progress they had made on the Union's behalf. They served not only as Petitioner's eyes and ears but they were Petitioner's very face in the campaign. Under these circumstances, the Petitioner clearly must have recognized that the only possible conclusion voters could reach was that Committee Leaders were acting on its behalf, which at a minimum establishes apparent authority and, therefore, requires application of the "party" standard in assessing the Committee Leaders' conduct.

a. The Union Directed the Committee Leaders

Committee Leaders' activities were generally directed by the Union and the Leaders understood and lived up to their Union obligations. (Tr. 185, 1563-64, 1496, 1612).[1] Committee Leaders were required to sign a pledge giving "formal commitment" to undertake activities on the Union's behalf, including: (i) keeping co-workers informed and involved in all Union

[1] Employer shall be citing to the transcript as "Tr.," the Board exhibits as "Bd __," Employer exhibits as "ER __," Petitioner Union Exhibits as "P __," and Regional Director exhibits as "RD __."

activities; (ii) identifying themselves as Leaders to co-workers and the Company; and (iii) faithfully attending Union Leadership Committee meetings. (Tr. 185, 1974; ER 13). Committee Leaders were issued and daily wore red and white buttons clearly identifying themselves as Leaders. (Tr. 28-29, 33-34, 52-55; ER 1). Committee Leaders faithfully attended weekly meetings conducted by the Union that continued during the year and a half period from when the campaign began through the election. (Tr. 38, 51-52). At the weekly meetings: (i) Leaders received training and direction by the Union on what they were and were not allowed to do (Tr. 45-46, 368, 1424-25); (ii) Union organizers reviewed the Union's literature to be distributed, as the Committee Leaders were the ones primarily communicating this information to employees (Tr. 391, 1983, 2015); (iii) Leaders were assigned their "lists of employees to contact" (Tr. 1458, 1985); and (iv) Leaders were told "what was to be done day by day." (*Id.*). The weekly meetings served as a critical conduit between the Union organizers and the Committee Leaders – and, ultimately, the employees in the proposed unit.

The Union directed Committee Leaders to speak to employees about organizing the Hotel, and assigned specific lists of employees to each Leader to be responsible for contacting and ensuring they received all the Union information to employees on their lists. (Tr. 36, 391-95, 1460, 1985-86, 1988-89). Leaders would "always talk to" the people on their list, they were encouraged to and, indeed, Committee Leaders "ha[d] to talk to everybody." (Tr. 423, 1459, 1461-62, 1987, 1990).

b. The Union Held Committee Leaders Out as Union Representatives

Petitioner held the Committee Leaders out as its representatives. Committee Leaders did not just hand out fliers, solicit authorization cards, and talk to people. Besides having the Committee Leaders wear special Committee Leader buttons and identify themselves as Leaders,

the Union went to great lengths to promote the Leaders, tell employees to speak with them, and make the Leaders the face of the Petitioner's campaign. Here, perhaps more than in any other case, Petitioner did everything possible to hold the Leaders out as Union representatives. The Petitioner's actions created a reasonable basis for a third person to believe that the Committee Leaders were authorized to act on Petitioner's behalf.

In almost all fliers distributed by the Union, employees were told to "Talk to your Committee Leaders" to learn about their rights to participate in Union activities, get more information, and ask questions. (P 5, pp. 1, 2, 3, 5-9, 11-12; ER 2, flier 1-3, 6-7). The Union also sent out a flier to all employees setting forth in detail exactly fifteen types of Employer conduct that would be considered "illegal," and telling employees, "If something like this happens to you – or you see it happen to a co-worker – tell your Committee Leader." (ER 35). Any third person reading these fliers understood that Petitioner was inviting, if not directing, employees to go to the Committee Leaders for information, for any questions, to learn their rights, and to report misconduct. (Tr. 1494). The record also shows that Union Organizers when talking with employees told them to talk to the Committee Leaders. (Tr. 2078, 720-21).

The fliers did not merely tell employees to speak with the Committee Leaders – on many fliers Leaders (and among the Employer's employees, *only* Leaders) were pictured front and center wearing their red and white Leader buttons and, on some, the Leaders provided statements to support the Union. (ER 2, 35; Tr. 86, 92-93, 100, 110, 1527-28). Any reasonable employee would recognize that the Union was highlighting these individuals and holding them out in written communications as their representatives.

Notably, while employees knew who the Committee Leaders were by virtue of the buttons they wore and their daily presence in the EDR and other areas of the Hotel, to the extent

the fliers also invited employees in the alternative to contact "the Union," the fliers did not provide the name of a *single* Union organizer to speak with. (ER 2, P 5; Tr. 382, 1820-21).

Petitioner held three rallies during the campaign and, at each one, in addition to the Petitioner officials and other distinguished guests, including presidential candidates, Committee Leaders – and only Leaders – joined these officials on the dais and spoke to the rally attendees and/or led chants. (Tr. 106, 161, 166, 169-70, 373, 1763-1765, 1805, 1848; ER 23; P 9, track 3 at :26, :42, 1:16). By bringing Leaders onto the dais with Union officials and having them speak, the Union cloaked them with agency status.

Petitioner also put forth Committee Leaders to be interviewed by the press, and were seen by employees on television talking about the Union – the same Leaders they saw on the dais at rallies, saw in the Union fliers, and were told by the Union that they were the people employees should speak to. (Tr. 162, 1775, 1805, 1229-30, 1098-99).

The Union also promoted the Committee Leaders and – among Hotel employees – *only* Leaders by interviewing them in their in-house videos about their rallies. (Tr. 162, 166, 168, 376, 1758-60, 1844, 1847; ER 23, P 9). These were not extemporaneous interviews. Committee Leaders discussed their remarks in advance with Union organizers "to be sure what [they were] going to say." (Tr. 410-11, 1759-60). The finalized rally videos showed the rally interlaced with interviews of the Committee Leaders and clips of them on the dais with Union officials and dignitaries. (ER 23).

The Union posted the finished products on its social media sites and in some instances texted and tweeted links. (Tr. 106, 1716, 1736, 1746-1747, 1752-53, 1759, 1769, 1867, 1838, 1761-62, 1768-69; ER 23; P 9). The Union distributed video players to four of the Committee Leaders so that they could play the video of the August rally in the EDR, in the parking lot, and

in employee homes, such that any employee who missed the rally could see what role the Committee Leaders had in the movement. (Tr. 106, 163-64, 1736, 1746-47, 1752-53, 1759, 1762, 1769; ER 23, P 9). This was yet another way the Union promoted the status of the Committee Leaders to employees to leave no doubt that Leaders were connected to and acted with the Union's authority.

While the videos did not expressly identify Leaders as Union representatives, they clearly communicated to employees the central role Leaders played on behalf of the Union. Committee Leaders were not presented as employees acting on their own but as part of the Union's team. In the videos many of the Committee Leaders can be seen wearing the Leader buttons given them by the Union to distinguish them from other employees, including other employees who supported the union. (Tr. 1758, 1755; ER 23). With respect to Committee Leaders, the message from the Union was clear: these are our people. This is just another example of intentional conduct on the Union's part that would reasonably lead employees to believe that Committee Leaders were authorized to speak for and act on behalf of the Union.

c. Committee Leaders Were the Primary Conduits of Information Between the Union and Employees

Committee Leaders were the primary conduits for communication between the Union and other employees, were substantially involved in the election campaign in the absence of Union representatives, spoke and asked questions on the employees' behalf at campaign meetings, and served as Union observers and electioneers during the election.[2]

Committee Leaders – not the Union – initiated the organizing campaign in June 2014, after approaching the Board and the Union to solicit their assistance in organizing. (Tr. 1900). Because the Hotel's policy prohibits non-employees from soliciting or distributing on its

[2] Indeed, the each of the Union's observers during the election was a Committee Leader. (Tr. 2015-2016, 2239).

premises (P 28 at p. 15 of 44), no Union organizers were allowed on the Hotel's premises during the course of the campaign. Organizing on the Hotel premises was undertaken exclusively by Committee Leaders. (Tr. 68-69, 1730, 2056).

Not only did Leaders "talk[]to employees about the [Union]" (HOR 5), Leaders were primarily responsible for answering employees' Union questions. The Union trained Committee Leaders on how to address employees' questions. (Tr. 1444, 1477-81, 2048). If a Committee Leader was not able to answer a question, Union Organizer Pineda testified that "we tell them what they have to say to the workers." (Tr. 2039). Even when a Union organizer did have direct communication with an employee, the organizer would tell the employee if they had any questions they should ask a Committee Leader. (Tr. 720-21, 2078). If a Committee Leader had a difficult time answering a question they would bring the worker to Union Organizer Pineda or a Union meeting. (Tr. 1982, 2039). Indeed, the record shows that employees primarily came to Committee Leaders with questions about the Union; not to Union organizers. (Tr. 1477-78).

Committee Leaders were responsible for reporting to the Union the status of the campaign at the Hotel, such as through the weekly Committee meetings. (Tr. 1982). The Committee Leaders would discuss what had been going on at the Hotel in the last week, what issues employees were having with regard to deciding whether to join the Union, and what the Hotel was saying in opposition to the Union. (Tr. 83-84, 172, 1479-80, 1571, 1607, 1612-13). Some of the issues and concerns raised were then used by the Union to create fliers to address employee concerns and respond to Hotel positions. (Tr. 2003-04). Leaders also would report perceived Employer misconduct to the Union. (Tr. 176, 1621). Leaders would bring signed cards and petitions to the Union at Committee meetings and would also report on their success in handing out buttons. (Tr. 1984).

Committee Leaders also played a key role in gauging the level of Union support at the Hotel. One of the responsibilities of the Committee Leaders through the campaign was to know the level of commitment of each employee. (Tr. 2437). Leaders were charged by the Union with the responsibility of keeping in constant contact with employees and providing information to the Union organizers as to their level of support and how often they wore buttons. (Tr. 217). At the weekly meetings, Leaders would discuss with the Union organizers which employees were wearing Union buttons and how often they were doing so. (Tr. 2438, 1498; ER 18). Leaders further would report to the Union organizers the names of people who did not want to sign the cards. (Tr. 1484). The Union kept a list of everyone who would not sign. (Tr. 424, 1485). Committee Leaders and organizers also kept a list of employees who did not want to wear a Union button. (Tr. 1491-92, 1539-40).

The Union organizers relied on the Committee Leaders to provide that information as part of the campaign. (Tr. 424). While Union organizers ultimately made the final rating decisions about employee sentiment towards the Union, they essentially based their decisions upon Committee Leader reports and observations. (Tr. 1992-95). The Committee Leaders were expected to have an idea as to how to code the employees, *i.e.*, whether they were likely to vote for the Union or not. (Tr. 2015). Without the Committee Leaders, there was no campaign.

d. Leaders Performed the Lion's Share of the Campaigning

Committee Leaders performed the vast majority of the organizing. For almost a year and a half, Leaders (at the height some 34 Leaders (Tr. 364)) spent a significant amount of their time engaging with employees in the EDR during breaks, before/after work, or during their days off. (Tr. 47-49, 71, 1601-02, 1427, 1432, 2248). Leaders also constantly tried to get employees to sign authorization cards. (Tr. 1428, 1601-04, 1680; ER 14-16, P 15, 30). Committee Leaders also distributed leaflets and fliers which the Union regularly provided to them, at times weekly.

(Tr. 1441, 1443). Committee Leaders would speak to employees as they passed out leaflets to see if employees had questions or concerns. (Tr. 1442). Committee Leaders also were responsible for distributing Union buttons. (Tr. 937, 1484, 2440).

In the final two weeks of the campaign, Committee Leaders were directed by the Union to persuade employees to sign a sheet stating that they were going to vote, that they were going to vote yes, and the time they would actually be voting. (Tr. 1461, 1509-10, 2239, 2254, 2240, 2253, 2258; ER 12). It was their duty to get as many people to sign as possible. (Tr. 1511-12, 2258-59).

The Union's direct contact with employees other than through the Committee Leaders was, in comparison, limited. Committee Leaders had sole access to the Hotel premises, and admittedly obtained the majority of cards and the majority of petition signatures. (Tr. 366, 1955-56). While some employees attended offsite meetings with organizers at the Union Hall or Macy's, it was the Leaders who would try to bring employees there to speak with organizers. (Tr. 1948, 1982, 2009-11, 2038). The Leaders performed the lion's share of the campaign activities.

The Union's minimal activities during the campaign were insufficient to avoid an agency relationship with the Committee Leaders. First, to the extent Union organizers engaged in Union activities, it was only through and because of the efforts of the Leaders. While the Union engaged in home and off site visits, held rallies where certain officers made statements, and issued communications electronically (HOR 6), these activities were possible only because of information provided by Leaders, and the results of these activities pale in comparison to results achieved by the Leaders. The majority of organization cards and petitions were obtained by the Leaders. (Tr. 1955-56). The Leaders were the ones who came to the Union asking for help to

organize (Tr. 1900), who solicited the authorization cards, and who obtained petitions with the contact information by which employees could be visited, texted and emailed. (Tr. 1731, 1732-33, 1778). The Leaders distributed fliers to invite employees to rallies (Tr. 391, 1441, 1443, 1983, 2015; ER 2), and initially solicited employees to meet with organizers at the Hall and off site. (Tr. 364, 1948, 1982, 2009-10, 2038). Although the Union prepared fliers (Report 6), the Union occasionally prepared fliers with the information provided by Leaders and reported at weekly meetings. (Tr. 2003-04). While eventually the Union obtained an *Excelsior* list with even more names (Tr. 2034, 2052), it would not have gotten that list without having the authorization cards obtained by the Leaders that was necessary to file the petition.

Second, the record shows that the Union made only modest, at best, and wholly unsuccessful attempts to reach employees electronically. The Union's Facebook page was not a primary method of targeting employees nor were its emails generally effective in reaching employees, and "not a lot of workers" follow the Union's Twitter account. (Tr. 1739-40, 1742-44, 1744-45, 1753; P 7). While the Union eventually began texting, *illegally*, it at most texted approximately 300 employees, and there was no evidence adduced that employees actually read the texts. (Tr. 1833). By comparison, for over a year and a half, Leaders had daily access to over 500 bargaining unit employees and were able to personally distribute fliers and other Union materials directly to employees. The limited and largely fruitless attempts by the Union to disseminate materials electronically to employees pale in comparison to the Committee Leaders' efforts and are wholly insufficient to preclude the Committee Leaders' agency status.

Third, while the Union testified to organizers engaging in home visits, the actual number of "successful" home visits – *i.e.*, a visit where an employee actually answered the door – were minimal, with the Union recording a mere 385 "successful house visits" *total* over the course of

the campaign. (Tr. 2004, 2008-09, 2037). This included both visits where the employee was receptive to listening and spoke with the organizers, and where the employee told them to just go away such that the organizers had no meaningful discussion. (Tr. 2008-09, 2028). In comparison to the number of "successful" contacts established in and around the Hotel by the up to thirty-four Committee Leaders who solicited employees every day for over a year and a half, it is difficult to see how Leaders could be considered anything less than the Union's primary contact with employees. (Tr. 366, 1955-56, 1987, 1990, 2258-59, 2365-66, 2353-54, 2439-40, 2455-56, 2480). Notably, Committee Leaders also performed some home visits with organizers – which again underscored the essential nature of the Committee's role. (Tr. 317, 1505, 1609-10).

The Union held only *three* rallies over the course of the one and a half year-long campaign. (Tr. 161, 373, 1848). While Union representatives and dignitaries did speak at these rallies, as discussed above, Committee Leaders remained front and center, sharing the stage with Union leaders, speaking, and leading chants. (Tr. 162, 168, 376, 1760, 1775, 1805, 1844; ER 23, P 9). Committee Leaders also promoted these rallies. (Tr. 81-82, 83, 91-92, 162, 166, 168; ER 2, flier 4; ER 23). Thus, any independent presence the Union maintained by holding these rallies is undermined by the fact that Committee Leaders were clearly visible and recognizable to employees attending the rallies as the voices of the Union representatives in the Hotel.

Despite this evidence, the HO and then the RD found that no agency relationship existed. The HO[3] declared that in order for a committee leader to be an agent, the Petitioner must have relied "exclusively" on committee members to convey its message such that the union is otherwise absent from the campaign, rendering the committee members "the only conduit for

[3] Given the RD adopted all of the HO's report, Employer will refer to the HO unless the reference is to something specific the RD added in his DCR.

union communication." (HOR 5). *Foxwoods Resort Casino*, 352 NLRB 771, 772 (2008). The HO found that the kinds of activities engaged in by committee leaders, including distributing authorization cards, Petitioner buttons, and fliers and generally advocating in favor of the Petitioner, were insufficient. Further, the HO found that the Petitioner was present throughout its campaign with the Employer by virtue of its creation and dissemination of fliers via text and email, the three rallies, and its home and off-site visits. (HOR 6).

The HO discounted the fact Committee Leaders spoke at rallies, claiming they were identified as employees and that Union officials spoke at rallies as well. (HOR 6). The HO further discounted the fact that fliers encouraged employees to talk to their committee leaders, claiming that was more indicative of inviting employee support for the Petitioner than creating the appearance that Committee Leaders had any authority to speak or act generally on behalf of the Petitioner. The RD further noted that the fliers also almost always contained a number for the Petitioner, thus providing Employees with direct access to the Petitioner without having to go through the Committee Leaders. (DCR 2). Even though the HO admitted Committee Leaders occasionally coordinated communication between the Petitioner and the Employer's employees because the Petitioner did not have physical access to the Employer's facility, they were not the exclusive conduit for such communication. (HOR 6; DCR 2).

2. Factual Errors

The HO's factual findings to minimize the agency status of Committee Leaders is belied by the record. Committee Leaders did not just hand out fliers and talk to people. The HO ignored the fact organizers served as the Union's eyes and ears at the Hotel, both in terms of answering employees' questions but also reporting back to the Union employee sentiment and who was or was not supporting the Union. (Tr. 720-21, 1444, 1477-81, 2039, 2078, 217, 424, 2437, 2438, 1491-92, 1498, 1484-85, 1539-40, 1992-95, 2015). The HO further ignored the fact

that the Committee Leaders were the ones who were bringing employees to speak to organizers, and it was the Committee Leaders who were getting authorization cards and other information by which the Union could communicate with employees directly and by home visits.

The HO further downplays the significance of how the Petitioner at every opportunity held the Committee Leaders out as its representatives and agents. The HO's attempt to minimize the fact that Petitioner fliers encouraged employees to speak with the Committee Leaders was simply nonsensical. The HO found that the fliers were "more indicative of inviting employee support for the Petitioner than creating the appearance that [C]ommittee [L]eaders had any authority to speak or act generally on behalf of the Petitioner." (HOR 6). The HO's finding simply cannot be reconciled with the fliers themselves – that literally told employees to talk to the Committee Leaders – and the record testimony clearly showing that Leaders were trained and held out to employees as the primary source for information about the Union.

The RD's attempt to minimize this was equally unpersuasive. The RD emphasized the fact the fliers also contained contact information for the Union (thus allegedly providing direct access to the Petitioner (DCR 2)), this does not defeat the fact the Union held the Leaders out as its representatives and agents. Nor does it show anyone bothered to take them up on that access instead of communicating with the Committee Leaders they saw at work every day. Indeed, the Union saw no point in even listing a lead organizer on these fliers because, after all, the Committee Leaders knew who it was. (Tr. 1820-21).

Similarly, the fact Leaders spoke at the rallies, and in the videos and to the press was discounted. The HO claimed that the Committee Leaders were identified at the rallies as simply employees, but there is no record evidence of that fact. Regardless of whether the Union identified Committee Leaders as employees, that is not the relevant test, but rather whether the

Union's conduct "created a reasonable basis for a third person to believe that the purported agent was authorized to act on behalf of the principal." *Bellagio, LLC*, 359 NLRB No. 128, slip op. at 3 (May 30, 2013); *Bristol Textile Co.*, 277 NLRB 1637 (1986) (finding agency status even though union did not designate the employee as "representative"). *See also NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d, 436, 433 (4th Cir. 2002) (committee member agents were "never formally identified as [u]nion representatives or agents. . . .").

The HO and RD rely on the fact that the Petitioner did home visits, text/emailed employees, and spoke with them at the Union hall and off site. (HOR 6, DCR 2). Yet they downplay the fact that the addresses and contact information necessary to make home visits and text employees was the result of the work of the Committee Leaders, who obtained the majority of petitions and authorization cards. (Tr. 366, 1955-56). The RD/HO also focus on the effort rather than the results. The fact is that the home visits provided minimal employee contact, and the emails and tweets also were failures in terms of reaching employees. (Tr. 1739-40, 1742-45, 1753; 2004, 2008-09, 2037, 2028). The Union did text employees -- many unlawfully -- but even then Petitioner cannot say anyone bothered to read them. (Tr. 1833). Nor can any of this compare to eighteen months of daily campaigning by Committee Leaders within the Hotel.

Last but not least, the RD/HO simply just ignored the fact that Committee Leaders not only produced the lion's share of the results, they did the lion's share of the work. They were outside and inside the Hotel every day for eighteen months soliciting employees, obtaining cards, getting petitions signed, distributing leaflets, polling employees, and selling the Union. (Tr. 47-49, 71, 937, 1601-02, 1427-28, 1432, 1441-43, 1484, 1601-04, 1511-12, 1680, 2248, 2440, 2258-59). They were the ones reporting back to the Union weekly and getting additional direction as

to how best to organize the Hotel. (Tr. 217, 2438, 1498, 1484, 38, 51-52, 1458, 1985, 424). They were Union agents.

3. Legal Errors

The RD/HO erred by adopting the Union's misapplication of the Board's agency test and assuming, in order to find agency, the Union must have relied "*exclusively* on [Committee Leaders] to convey its message such that the union is *otherwise absent* from the campaign, rendering the [Committee Leaders] the *only* conduit for union communications to employees." (HOR 5) (emphasis added). That is not the law.

Far from a *sole and exclusive* contact test, "the relevant inquiry requires a broader consideration of 'all the circumstances' to determine whether the principal's conduct created a reasonable basis for a third person to believe that the purported agent was authorized to act on behalf of the principal." *Great American Products*, 312 NLRB 962, 963 (1993); *Bellagio, LLC*, 359 NLRB No. 128, slip op. at 3 (May 30, 2013), *invalidated by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). To determine agency, the Board looks at various activities, including whether the committee members (i) were the *primary* conduits for communication between the Union and employees; (ii) were *substantially involved* in the campaign in the absence of union representatives; (iii) spoke and asked questions on the employees' behalf at campaign meetings and with Hotel managers; and (iv) served as Union observers, tally representatives, and electioneers during the election. *See Bristol Textile Co.*, 277 NLRB at 1637; *Bio-Medical Applications of P.R.*, 269 NLRB 827 (1984). *See also In Re Cornell Forge Co.*, 339 NLRB 733, 733 n.5 (2003) ("We do not suggest that in-plant organizing committee members may be union agents only if they are the union's primary conduits for communication or its primary employee contacts.").

The cases cited by the HO fail to support her test. In *Bio-Medical Applications*, members of the union's in-house organizing committee were union agents even though the union conducted organizational activities at three of the employer's facilities and held meetings and other special events for employees, which were attended by the union's secretary and president. 277 NLRB at 827. Similarly, in *Bristol Textile Co.*, the Board found an agency relationship even though the union conducted several meetings with employees where the purported agent made weekly reports to the Union concerning the campaign and relayed employees' questions to the Union. 277 NLRB at 1637. These cases make clear that an alleged agent need not be the union's *sole and exclusive* contact with employees. *See also In re Cornell Forge Co.*, 339 NLRB at 733 n.5. Indeed, they support an agency finding here.

The RD, in his decision, also relied upon *Advance Prods. Corp.*, 304 NLRB 436 (1991), claiming that the Committee Leader activities in the instant case do not even rise to the level of that case. (DCR 2-3). That case, a decision wherein one Board member found agency status, is easily distinguishable, for in *Advance Prods.* there was no evidence the union ever held committee members out to employees as its agents. *Id.* Here, the Petitioners repeatedly in fliers told employees to speak with Leaders, gave them special buttons identifying them as leaders, told Leaders to identify themselves as such, placed them next to union leadership at rallies and had them speak, and prominently displayed them in newsletters, videos and in press interviews. Moreover, unlike in *Advance Prods.*, Leaders had a much greater role in the campaign. For example, they met with the Union weekly to review the campaign and report back to the Union, and engaged in actual polling for the Union. There is no evidence that the committee members in *Advance Prods.* were as actively involved in the campaign with the Union, and no evidence that they had any role in polling.

Had the RD/HO applied the proper test, and properly applied the record, they would have found that the Committee Leaders here were agents. Committee Leaders – not the Union – initiated the organizing campaign in June 2014, after approaching the Board and the Union to solicit their assistance in organizing. (Tr. 1900). *See Kentucky Tennessee Clay Co.*, 295 F.3d at 443 (committee member agents initially contacted union organizer). The Union then directed the Committee Leaders' activities, something the HO ignored, by holding weekly meetings to train and educate the Committee Leaders on organizing next steps. *Cf. Windsor House C & D*, 309 NLRB 693, 694 (1992) (Member Oviatt concurring); *Kentucky Tennessee Clay Co.*, 295 F.3d at 443 (committee member agents carried out organizing efforts within the plant "often at the direct request" of union organizer).

In downplaying the Committee Leaders' role, the HO further ignored the fact that Committee Leaders performed the vast majority of the organizing. *See, e.g.*, *Kentucky Tennessee Clay Co.*, 295 F.3d at 443 (committee members agents of union where union organizers "placed the lion's share of the organizing work upon" committee members); *Mastec North America, Inc.*, 356 NLRB No. 110, slip op. at 2 (Mar. 7, 2011) (the extent of the purported union agents' role in the campaign is "an important factor in analyzing the apparent authority of in-plant organizing committee members.").

Moreover, they were the Union's "eyes and ears" and acted at the behest of the Union. *See PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 819 (4th Cir. 1982) (finding agency status when employees' contact with organizers was "minimal" compared with the committee leaders). They were the primary conduits for communication between the Union and other employees, were substantially involved in the election campaign in the absence of Union representatives, spoke and asked questions on the employees' behalf at campaign meetings and with Hotel

managers, and served as Union observers, tally representatives, and electioneers during the election.[4] *See Bio-Medical Applications*, 269 NLRB at 827-28; *Bristol Textile Co.*, 277 NLRB at 1637 (employee was union's conduit to employees in plant and was the only employee with whom union vice president dealt; also, employees perceived alleged agent as union's representative); *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976) (committee members were union agents where employees viewed committee as union's in-plant representatives, and union used committee as its liaison with employees). *Accord NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976) (finding committee members to be union agents because they were "the union's only in-plant contact with the workers," and because "in the eyes of the other employees [they] were the representatives of the union on the scene and the union authorized them to occupy that position.").

Despite the HO and RD's attempts otherwise, the Union's direct contact with employees other than through the Committee Leaders was, in comparison, limited. Committee Leaders had sole access to the Hotel premises, and admittedly obtained the majority of cards and the majority of petition signatures. (Tr. 366, 1955-56). While some employees attended offsite meetings with organizers at the Union Hall or Macy's, it was the Committee Leaders who would try to bring employees there to speak with organizers. (Tr. 1948, 1982, 2009-11, 2038). Electronic communication with employees was largely ineffective, and home visits similarly produced limited results.

In sum, because the evidence take as a whole conclusively establishes that the Union purposefully used the Committee Leaders to perform critical campaign activities and held them

[4] Indeed, the each of the Union's observers during the election was a Committee Leader. (Tr. 2015-2016, 2239).

out in a manner that would reasonably lead employees to conclude the Leaders were acting on the Union's behalf they must be considered as Petitioner's agents.

II. REVIEW ISSUES APPLICABLE TO MULTIPLE OBJECTIONS

A. Misapplications of the Tests for Objectionable Conduct

Throughout her Report, the HO made three common errors when determining whether conduct was objectionable -- errors which the RD adopted. First, as Committee Leaders are agents, the HO erred in applying a third party conduct test instead of the party misconduct test. (HOR 4-6). The proper test for evaluating conduct of a party is an objective one; that is, whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg.*, 316 NLRB 716 (1995); *Taylor Wharton Division*, 336 NLRB 157 (2001).

Second, the HO repeatedly cited and relied upon subjective evidence to determine there was no objectionable conduct even though both conduct tests are objective. (HOR 16, 21, 24-26). *Local 299, Int'l Bhd. of Teamsters, AFL-CIO*, 328 NLRB 1231 n.2 (1999) (the test is an objective one); *Picoma Industries*, 296 NLRB 498, 499 (1989); *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), *enf'd.* 649 F.2d 589 (8th Cir. 1981). What the employees subjectively believed is thus irrelevant. And if it was relevant, then the HO erred by denying Employer the opportunity to delve into the subjective understandings of its witnesses.[5]

Third, on numerous occasions the HO determined that no objectionable conduct could have occurred given either that Employer told employees the Union could not follow through on its threats or that employees already knew that the Union could not do so. (HOR 20, 22, 24-26). In addition to the irrelevance of the employees' subjective beliefs in general, the party engaging in misconduct is the party with an obligation to repudiate the misconduct if it wishes to avoid an

[5] The HO erred by repeatedly sustaining objections when Employer sought such evidence (Tr. 538-39, 872, 1338), but permitting Petitioner to solicit such information. (Tr. 1114-15, 2361).

objection. The Board applies *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), to determine whether effective repudiation avoided destruction of laboratory conditions. *See, e.g.*, *In re Community Action Commission of Fayette County, Inc.*, 338 NLRB 664, 667, 667 n. 12 (2002) (applying *Passavant* standards, by analogy, to assess whether otherwise objectionable conduct has been effectively neutralized by other employer statements); *Columbia Alaska Regional Hospital*, 327 NLRB 876, 877 (1999); *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992)). The *Passavant* repudiation standards and obligations are equally applicable to unions as they are to employers. *See, e.g.*, *Graphic Communications Conference*, 359 NLRB No. 22, slip op. at 9 (Nov. 27, 2012); *In re Denver Newspaper and Graphic Communications Local No. 22*, 338 NLRB 130, 131 (2002); *In re Healthcare Employees Union*, 333 NLRB 1399, 1401 (2001). That Employer tried to allay the fears of its employees does not permit the Union to escape its responsibility for its agent's conduct or its obligation to repudiate.

B. The HO Failed to Look to the Evidence As a Whole As Opposed to Piece By Piece

In determining whether the conduct alleged to be objectionable requires the setting aside of the election results, the HO and, by adoption, the RD, employed a highly fragmented and inappropriate approach, judging each piece of misconduct largely in isolation. *Fresenius USA MFG.*, 352 NLRB 679, 681 (2008) ("cumulative effect of election irregularities [arising from conduct of Board Agent] raises a reasonable doubt as to the fairness and validity of the election"). As the court observed in *Swing Staging Inc. v. NLRB*, 994 F.2d 856 (D.C. Cir. 1993), when evaluating alleged election misconduct, an assessment must be made of the cumulative impact of the alleged misconduct rather than an analysis of each objection solely in isolation. Similarly, in *Overnite Transp. Co. v. Highway, City, and Air Freight Drivers Local 600*, 105

F.3d 1241, 1245-46 (8th Cir. 1977), the court observed that "alleged objectionable acts must be analyzed in terms of their cumulative effect."

Using a fragmented approach, the HO fails to credit the integrated pattern of misconduct and dissemination which existed. As a result, for example, the HO minimized the extent to which misconduct was disseminated by focusing on the dissemination of each instance of misconduct instead of looking at the total dissemination. It also allowed her to ignore the impact objectionable conduct, for example, as to prior surveillance in the EDR and at the elevator landing during polling times, threats as to what might happen if employees did not support the Union, and the soliciting of employees to commit when/how to vote impacted each other. It further allowed her to compartmentalize each objection to find that separately they did not meet her errant third party standard, when collectively the misconduct as addressed in detail herein precluded the holding of a free and fair election under any standard. Taken together with the other misconduct profiled below, and given the relative closeness of the vote – where approximately a 3% change would alter the outcome of the election – the cumulative effect of the misconduct clearly has the tendency to interfere with employees' free choice and/or is so aggravated as to create a general atmosphere rendering a free election possible.

C. The HO/RD Erred in Their Credibility Findings

1. De Novo Review Largely Applies to the HO's Credibility Findings

Throughout her Report, the HO found Employer's evidence and witnesses insufficient to demonstrate that objectionable conduct occurred. The HO went to great lengths to discredit, discount, or outright ignore the testimony of nearly all of the over 20 witnesses favorable to the Employer, despite most being bargaining unit employees with less motive to lie or obfuscate than Petitioner's witnesses. Where the HO does tacitly accept Employer witness testimony, she usually does so only where the testimony comports with clear video evidence or the testimony of

a Petitioner witness or Board Agent the HO credited. The HO's near blanket discrediting of Employer's witnesses is nothing short of remarkable and strains credulity to the breaking point. The RD simply adopted the HO's credibility findings after applying the clear preponderance of the evidence test without even addressing the fact that most of her findings were not even subject to such a standard. (DCR 1 n.1).

A review of the record demonstrates the HO erred in her findings. Critically, with limited exceptions, the HO's findings are not entitled to the clear preponderance of the evidence standard set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d Cir. 1951). That standard does not apply where the credibility determinations are not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 4 (Feb. 3, 2016). In those cases, the Board is as capable as the judge of analyzing the record and resolving credibility issues. *Id.* The RD, however, did not even address this issue.

While the HO referenced that her credibility decisions were based on her observations of testimony and demeanor, of the 44 witnesses who testified, she only addressed the demeanor of Adam, Gelardi and Albano, albeit in a limited fashion.[6] (HOR 20, 27). At no point did she specifically compare and contrast the demeanor of conflicting witnesses. Her credibility findings, to the extent explained, are instead based upon the witnesses' recollections and the specificity of their testimonies on the record. Such determinations not based on demeanor are not entitled to a preponderance of the evidence standard, but instead are to be reviewed de novo. *Samsung Electronics America, Inc.*, 363 NLRB, slip op. at 2; *Stevens Creek Chrysler Jeep Dodge Inc.*, 357 NLRB No. 57, slip op. at 2-3 (Aug. 25, 2011) (finding credibility not primarily

[6] Employer concedes *Standard Drywall* arguably applies as to these three, but as addressed *infra*, credibility is irrelevant as to Adam.

based on demeanor where ALJ generally referenced demeanor, but did not specifically refer to demeanor of the witness at issue or that of any other witness); *J.N. Ceazan Co.*, 246 NLRB 637, 638 n.6 (1979).

Moreover, in coming to her credibility findings, the HO failed to consider the credibility of witnesses providing contrasting testimony (*e.g.*, Llarull, who as noted below has no credibility), and erred by discrediting witness testimonies based on specific recollection issues despite the witnesses' sincere efforts to testify accurately. *Save Mart Supermarkets*, 326 NLRB 1146, 1150 (1998) (crediting witness even though "[h]e did not recall the dates and times of certain [] meetings); *Georgia-Pacific Corp.*, 197 NLRB 130, 140 (1972) (crediting witness where "he did not recall dates very well and so stated," but "appeared to make a sincere effort to try to remember what was said . . . ."); *Paragon Systems, Inc.*, 362 NLRB No. 182, slip op. at 3 n.7 (Aug. 26, 2015) (crediting witness who was "often vague [and] fail[ed] to recall dates," but was not "deliberately evasive" and his testimony was consistent with another); *see generally* NLRB Guide for Hearing Officers, p. 169 ("[K]eep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony.").

Not only did the HO errantly discount Employer witnesses' testimony when they could not pinpoint certain specific dates and times, but the HO sidestepped the same issue of other witnesses. Petitioner's witnesses equally had trouble recalling specific times or details. *See*, *e.g.*, Llarull (Petitioner's case in chief testimony at footnote 8, *infra*), Mendoza (Tr. 1427, 1433, 1436, 1445-47, 1457, 1467, 1447-73, 1503, 1505), Vargas (1562, 1564, 1574, 1581, 1598-99, 1603-5, 1610, 1618, 1624, 1626, 1631, 1634, 1653-54, 1685), Martinez (Tr. 1692-95, 1698-1700, 1703-04), Rivera (Tr. 2114-18, 2125-27, 2130, 2134, 2136, 2140, 2143-45, 2147-48,

2150-54, 2157, 2161-65, 2170-72, 2177-78, 2180-81, 2184, 2189), Diaz (Tr. 2215, 2220, 2222, 2226-27), Blanco (Tr. 2243, 2244-46, 2260), N. Rodriguez (Tr. 2277-78, 2284-85, 2287), Adam (Tr. 2504-10, 2511, 2514-15, 2518).[7]

Even Agent Anzaldua, whose testimony the HO found to be "detailed, specific, and consistent" (HOR 7), and who only had to recall the events of two specific days that happened just a month before he testified, could not: (i) describe when he encountered people in the electioneering area, going back and forth from he did not know what day to perhaps it was the first day, but he was not sure, but definitely not the first session; (ii) describe them other than their sex and approximate age; (iii) describe what they were wearing at all, even whether they were wearing uniforms or buttons; (iv) recall what they said beyond a mere reference to not trusting security; or (v) say whether the individuals voted or not. (Tr. 281-82, 290-93). Like many witnesses, he also testified to a lack of memory or recollection on numerous occasions beyond just about the persons in the hallway. (Tr. 252, 254, 259, 263, 265, 279). At many times, he could not provide necessary detail. (Tr. 252-54, 258-59, 260, 264-65, 268, 279, 290-92). Yet, while the HO credited what Anzaldua did remember (Employer does not doubt Anzaldua's sincerity), when it came to Employer witnesses with similar (or even lesser) recollection problems, many of whom testified as to time frames going back months, their testimony could not be credited.

Such a disparate standard is not appropriate and only further demonstrates that the inability to recall specific dates and times over a seven month critical period cannot be given much weight. *Triple A Machine Shop*, 235 NLRB 208, 209 (1978) (hearing officer placed an

[7] The difference was when Petitioner witnesses had zero recollection of timing the HO permitted their general testimony of things they usually said (Tr. 2318, 2320, 2322-23, 2331), yet sustained objections when Employer witnesses who were repeatedly threatened by Leaders were similarly asked questions regarding multiple conversations. (Tr. 806, 937-39, 942-43, 1019-20, 1434-36, 1575, 1696-99).

unwarranted emphasis on witnesses' inability to recall the specific time of a conversation while failing to consider a credited witness' similar inability to recall the specific time of the conversation, noting that "the relevance of [this factor] to witness credibility is highly conjectural and [] entitled to very little weight.").

Last, but not least, assuming, *arguendo*, that some of the HO's credibility findings are entitled to a higher standard of review, the Board should still reverse. First, in many circumstances, the HO simply failed to credit an Employer witness without any analysis of why or how the HO resolved conflicting testimony. She also failed to look at the bigger picture, in particular, when it came to threats and how numerous witnesses testified to being subject to similar threats. *See Salant & Salant, Inc.*, 92 NLRB 417, 424 (1950) (refusing to accept credibility findings because of trial examiner's "patent failure to recall and properly evaluate background facts, corroborative testimony, and other objective circumstances bearing upon the probable veracity of each witness in turn."); *PPG Aerospace Industries, Inc.*, 355 NLRB 103, 104 n.7 (2010) (must assess and balance the totality of circumstances impacting on the credibility of testimony, rather than applying permissible inferences as hard and fast rules). The HO's credibility findings are fatally flawed.

2. Llarull Cannot Be Credited Over Employer Witnesses

The HO erred by failing to expressly find Llarull to be incredible, and erred to the extent that she implicitly credited Llarull every time she discredited opposing testimony. Llarull was the key Petitioner witness, was one of the most active Committee Leaders and the sole Petitioner witness on many claims. Although the HO worked hard to avoid directly crediting Llarull, she effectively did just the same by ignoring and discounting conflicting testimony from other witnesses. The RD failed to even address this issue, instead just adopting the HOR and citing to the clear preponderance of the evidence standard. (DCR 1 n.1).

Llarull demonstrated time and time again that she will say what she thinks will help her case and what she thinks she can get away with – regardless of whether it is true. Llarull called it "my truth." (Tr. 142). She testified contrary to fellow Leaders, organizers, the Board Agent, herself, and video evidence. A sampling of Llarull's easily identifiable lies and misrepresentations follows:

Llarull	**Fact**
Never asked anyone to be a Leader; instead people volunteered. (Tr. 37).	Soliciting employees to join the committee was part of a Leader's role. (Tr. 1609).
Denied reporting who was for the Union, against the Union or undecided. (Tr. 41-43).	Llarull later admitted Leaders were responsible for providing information to the organizers as to the employees' level of support and how often they wore buttons. (Tr. 217, *see also* 424, 2438, 1498, 1485, 1491-92, 1539-40, 1992-95, 2015).
Denied calling the Union attorneys or telling anyone at the Hotel that she was going to call Union attorneys. (Tr. 45, 118).	Mariscal and D. Rivera heard it. (Tr. 537, 995). Llarull signed a statement saying she sent pictures to the attorneys. (ER 9). L. Rivera admitted Llarull said the attorneys are going to come. (Tr. 2135). Llarull later claimed she said she was going to call the Union so that *they* could notify the attorney. (Tr. 2380).
Denied considering herself to be one of the most active Leaders. (Tr. 47).	Confronted with prior testimony. (Tr. 51).
Claimed she never solicited employees to sign card, but only gave them one if asked. (Tr. 55, 57).	Prior testimony contradicts her. (Tr. 58).
An employee only got a button if they asked for one. (Tr. 70-71).	Later testified she offered buttons to all employees. (Tr. 2440).
Claimed she did not encourage people to attend the rally. (Tr. 90).	Earlier, in response to the question whether the Union told her to encourage people, claimed Union did not say anything, "This is my job." (Tr. 82).
Claimed no direction from the Union as to how to be an observer. (Tr. 92).	The Union trained its observers and handed out materials. (Tr. 1969-70, 2015; P 14).

Llarull	Fact
Organizers Pineda and Navas said she could post fliers on Hotel walls. (Tr. 113-14).	Pineda did not tell her to put up signs in the Hotel. Union recommends they hand out Union fliers – doesn't know if they posted fliers. (Tr. 2018).
After Cicutto dislodged the posting it was hanging by one corner after the three other corners had been removed. (Tr. 114-15, 126).	Contradicted by Lopez (Tr. 992-93), and the video. (ER 8 at 12:16:32.427 - 12:16:39.427). Even L. Rivera claimed that only one piece of the poster was hanging loose. (Tr. 2180-81).
Claimed Mariscal did not use new tape to repost the notice. (Tr. 119).	Contradicted by video and Mariscal. (Tr. 538-42; ER 8 at 12:17:45.627 - 12:21:40.226).
Shown the new tape video, claimed the tape did not stick. (Tr. 130).	The poster was securely fastened to the wall. (Tr. 542; ER 8 at 12:17:45.627 - 12:21:40.226).
Denied tearing the government notice down. (Tr. 120).	Contradicted by the video. (ER 8 at 1:49:58.901 - 1:50:23.801).
Faced with video, Llarull claimed to have taken down poster to take it to human resources. (Tr. 133-34).	Contradicted by the video. She did not completely remove it and left it hanging. (ER 8 at 1:49:58.901 - 1:50:23.801, and 1:51:28.801 - 1:54:24.999).
Claimed she took a photo of the sign being down for evidence, but did not send it to anybody, much less the Union. (Tr. 135, 155-56).	Llarull sent photo to the Union. (Tr. 2017; ER 10; ER 8 at 1:50:31.701 - 1:51:28.801). Llarull later admitted to showing the photo to co-workers. (Tr. 2412).
Not recall when she took ER 10 since poster looked like that several times.	Contradicted by the video. (ER 8).
Denied Perez complained about her telling people left, and denied agents addressed the situation. (Tr. 192-94).	The Board agent remembers Perez's complaint and that Llarull's response to the complaint was that the voter could not see. (Tr. 262-63).
Denied taking photo/video of any employees wearing hotel buttons, or seeing Leaders doing so. (Tr. 204).	(ER 25-26).
Director Magana suspended her for wearing the button and called her names. (Tr. 361-62).	Magana was not there and did not do it. (Tr. 1064-65, 1068-69; ER 32). Vargas admitted Kwon suspended each of them individually. (Tr. 1623).
Denied taking a photo of Tomasello earlier on Dec. 3, when he had the bottles. (Tr. 2404, 2414, 2419-23).	Contradicted by the video and photos. (Tr. 2419-23; ER 40, ER 37 at 1:13:01.768, 1:13:15.568, and 1:13:20.568).

Llarull	Fact
Claimed Alonso was a supervisor. (Tr. 2383).	Contradicted by his manager and by Ascencio. (Tr. 2725, 2731, 2800-2805).
Llarull claimed she never spoke with S. Ramos when she was yelling at her and poking her. (Tr. 2358, 2459).	Both were talking. (Tr. 2160, 2642-43, 2660).
Denied that she said S. Ramos was being paid. (Tr. 2459, 2461).	Contradicted by S. Ramos and Keeran. (Tr. 2645-2646, 1172-73, 1236).
Llarull saw Cicutto taking photos of her when he walked back past a dividing wall. (Tr. 2304-05, 2404-054; ER 21 at 4:34:21.672 - 4:34:36.072).	Contradicted by Cicutto as well as by the video. (Tr. 2586, 2592; ER 21 at 4:34:21.672 - 4:34:36.072).
Claimed she witnessed an employee threaten to put a bullet into every-body's head who had anything to do with the Union. (Tr. 2483, 2488).	Contradicted by an actual witness, and security footage. (Tr. 2742, 2744-45, 2769, 2760-70; ER 47, 48 at 8:21:28.812 to 8:25:15.812).

Llarull further had no regard for the HO's sequestration order (Tr. 23-24), as Natividad Rodriguez admitted that her purported "understanding" had been "clarified" by Llarull minutes before she testified. (Tr. 2283-84 ("today Carmen clarified that")). And while the HO took issue with Employer witnesses' inability to recall specific dates and events over the course of the critical period, when Llarull was not outright lying, she had the worst recollection of any witness.[8]

Llarull will say or do anything to support her "truth" and is not at all creditable. The HO and RD should not have credited her testimony over any other employee.

[8] For Llarull's testimony just in Petitioner's case-in-chief, *see, e.g.*, Tr. 2291, 2326, 2340, 2346, 2355-56, 2412, 2416, 2425, 2461, 2381, 2396, 2413, 2416-17, 2420, 2440, 2443, 2448-49, 2458, 2461, 2467, 2469, 2470-71, 2479-80, 2487-89, 2292, 2310-11, 2331-32, 2357, 2359).

III. THE EMPLOYER'S OBJECTIONS WARRANT A NEW ELECTION

A. Objection 1: Observer Misconduct

During the election session held on December 4, 2015 between 6 AM and 9 AM, the Union's agent, observer and organizing committee member Carmen Llarull told no less than two employees to "mark the left" (vote yes). Llarull's instructions were overheard by the Hotel's observer who informed the Board Agent. The Board Agent did not speak Spanish, thus was unable to monitor Llarull or know what she was saying. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election. The Region's failure to staff the election with a second Spanish speaking Board agent to monitor and prevent Union observers from directing employees to vote for the Union also tainted the election results.

The HO and RD's findings as to Objection 1 have been distorted by fundamental errors in crediting testimony and a corresponding misapplication of the law and a failure to recognize the importance of protecting the integrity of the election process.

1. Summary

During the first polling session, which ran from 6:00 am to 9:00 am on December 4, 2015, Employer Observer Magdiely Perez witnessed Union Observer and Committee Leader Carmen Llarull on at least two occasions instruct an employee "left, left" in Spanish, meaning for the employee to mark the left side on the ballot, *i.e.*, to "vote yes." (Tr. 440, 441, 446, 476, 470, 478-79, 479-80, 497, 503). Perez reported this to the Board Agents after the second time. (Tr. 260, 262, 446-47, 488). The Board Agents came to the observer table and told Llarull that it could not happen again. (Tr. 262-63, 275-76, 447). Llarull did not deny that it had occurred, but instead claimed that she was helping them because they could not see well. (Tr. 263, 447, 489, 506). Perez asked why, if she was helping people, didn't she tell people what it said on the right and what it said on the left, and why she was saying what was more convenient for her. (Tr. 447, 490, 506). This conversation occurred approximately five feet from the entrance to the polling area where a line of employees was waiting to vote. (HOR 8; Tr. 189-90, 264).

Llarull also hugged a voter whom she had not seen for a while (Tr. 445-46), and kept her cell phone with her in the middle of the papers she had to challenge voters, and she checked it constantly. (Tr. 449). Notably, both observers attended the pre-election conference where they were provided a list of instructions to read, and were specifically told by the Board Agents not to engage in conversations with voters but only to greet them, that they could not use their phones and to preferably turn them off, and that they were to behave neutrally. (Tr. 185-87, 249-51, 439; RD 5-6). Perez told some of her co-workers what had happened during the voting session because it was a new experience for her and she had a need to discuss it. (Tr. 507-08).

The HO found that Llarull hugged one voter and made a comment to at least one other voter about the left (yes) side of the ballot. (HOR 7-8; DCR 3). The RD further found that Llarull was answering a question from a voter instead of instructing someone how to vote. (DCR 3). The HO/RD did not credit testimony that the comment was made twice, that Llarull had been explicitly instructed not to do such things, or that Llarull checked her cell phone. (DCR 4-5 n.4; HOR 7). The HO did not find that other employees had been told by Perez about the left incident or that employees waiting in line heard about it. (HOR 9). The RD determined the one "left" incident was a "'chance, isolated, innocuous comment' between two persons" insufficient to overturn the election. (DCR 5).

2. Factual Errors

The HO erred by crediting non-evidence as evidence in order to come to her conclusions, and by crediting a witness, Llarull, with no credibility whatsoever. (HOR 7). The HO relied upon Board Agent Anzaldua's testimony to find that the "left" comment was made once, and that Llarull did not check her phone. (DCR 3; HOR 7-9). Yet, Anzaldua admittedly did not "remember" seeing Llarull use her phone (Tr. 196-97, 267), could not "hear" Llarull make her "left" comments (Tr. 189, 260, 273), and did not "recall" whether Perez reported that Llarull had

told two voters about the "left" side of the ballot. (Tr. 260-61). That is not evidence. *Products Unlimited Corp.*, 280 NLRB 435, 441 (1986) (foreman "did not deny, but merely claimed that he did not recall"); *Offshore Shipbuilding*, 274 NLRB 539 (1985) (supervisor did not deny making allegedly unlawful statement, "but said he did not remember making such a remark."), *overruled on other grounds*, *Kalin Construction Co., Inc.*, 321 NLRB 649 (1996); *Detroit Plastic Products Co.*, 121 NLRB 448, 504 n.93 (1958) (refusing to credit witness' denial, where employee previously admitted that he had no memory or recollection of event).

The only evidence on the second voter and the cell phone comes from Perez and Llarull.[9] As addressed in Section II(C)(2), *supra*, Llarull has zero credibility and, indeed, not only denied *any* "left" comment, but also denied that Perez complained and that the Board Agents had a discussion about it. (Tr. 192, 192-94). By finding that Llarull did not use her phone and only told at least one voter "left," the RD/HO essentially credits Llarull over Perez when Perez was the far more credible witness. Granted, Perez's testimony at times was inconsistent with an earlier affidavit. (HOR 8-9). She was also inconsistent in how loud the left comments were, confused the voters to whom Llarull made the "left" comment, and, since the voter she misidentified spoke English, claimed that the comment must have been said in English. Perez, however, upon hearing her affidavit, readily agreed that Linder was the second voter, that she had confused the two, and that the left comment was in Spanish as she originally stated in her earlier affidavit, written shortly after the events occurred. (Tr. 496-97, 503-04). Likewise, the "mark to the left" instead of "left, left" "inconsistency" is a distinction without a difference. (HOR 8). However it was said, the HO rightfully found that Llarull made *some* comment about marking the left side of the ballot. (*Id.*). Notably, Perez was consistent in her affidavit and on

[9] The HO properly discounted Aleman's testimony as summary in nature. (HOR 7).

the stand that the comment was said to two voters (Tr. 495, 506), and consistently testified that Llarull used her cell phone. Her testimony on these issues should have been credited over the totally incredible Llarull. NLRB Guide for Hearing Officers, at 169 ("When assessing a witness' credibility, the HO should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony.").

The RD also reached two new factual conclusions. First, he tried to minimize the left infraction by claiming that the HO found Llarull simply was answering a question from a voter. (DCR 3). There is no record evidence of such a Q&A, the HO made no such finding, and indeed she only found that Llarull claimed a voter could not see. (HOR 7-8). The RD also claimed that Llarull's actions were not "explicitly contrary" to the Board Agents' instructions, yet: the HO found that Llarull's instructions to voters were contrary to the instructions of the Board agents, and the record is clear that the written and verbal instructions expressly prohibited all that occurred. (DCR 4; HOR 10; Tr. 185-87, 249-51, 439; RD 5-6).

Likewise, the RD/HO erred by failing to find the "left" comments were disseminated. (DCR 5; HOR 9). Perez told co-workers, and her testimony was consistent on direct and on cross. While, as the HO noted, she used the word "maybe" at one point (HOR 9; Tr. 506-07), she was quite definitive on cross. (Tr. 511). Perez further credibly explained why she discussed it, as it was a new experience for her and she had a need to talk about it. (Tr. 506-07). There was no basis to ignore or disbelieve this undisputed testimony. Critically, Agent Anzaldua testified there were people in line to vote at the time Perez complained about Llarull's left comments. (HOR 8-9; Tr. 189-90, 264). Yet the HO found this to be insufficient evidence of dissemination despite the fact that the Agents, Perez, and Llarull discussed Llarull's left

comments just five feet from the people waiting in line to vote. (HOR 9). Given the objection made by Perez was sufficient for Anzaldua from five feet away to go to the observer table, and Johnson from his station at the door five feet away did the same, it is difficult to believe voters waiting at the door did not witness and hear the conversation as Perez complained. Any ordinary conversation is going to be heard from that distance and, indeed, twice that distance. The only logical conclusion is that voters waiting in line heard the conversation.[10]

3. Legal Errors

The HO/RD erred in applying the electioneering factors set forth in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982). While the RD acknowledged the conduct was within the polling place (and by definition in a no electioneering area), and by a party, he erred in the claim it only occurred once, that others did not hear about it, and that it was not explicitly contrary to the instructions of the Board Agent. (DCR 4). The HO/RD also ignored the other conduct occurring during this same period, namely the hug and the cell phone usage.

The HO/RD further erred by discounting *Brinks Inc.*, 331 NLRB 46 (2000), which overturned a close, contested election. (HOR 9-10). Granted the observer in *Brinks* told just four voters how to vote (instead of 2), and gave a thumbs up to other employees as opposed to a hug. *Id.* at 46-47; (DCR 5 n.4). But there is no Board-sanctioned minimum level of misconduct, however, in which observers are permitted to engage. Whether the comment was said at least once, at least twice as the record shows, or four times in *Brinks*, the violation and infringement on the integrity of the voting process exist. Nor should it make a difference if voters heard the

[10] The HO's reference that neither party called witnesses waiting in line is true, but also meaningless. (HOR 8). That presumes either party knew who was in line, of which there is no evidence. And with regard to Agent Johnson, calling a Board agent is not easy and, notably, the Region had its own attorney there to ensure a full record and he chose not to call Johnson.

comments directly, heard it from a witness after the session, or while waiting in line heard the Board Agents and observers discussing the matter.

Nor can this be considered a chance, isolated, innocuous comment or inquiry as the RD claims. (DCR 4). Llarull was not asking voters about the weather. She did not happen to stumble upon them as she was walking by. Llarull affirmatively told employees how to vote in the middle of the election room. There can be nothing more egregious or offensive to the integrity of the election process than that. The cases cited by the RD otherwise are distinguishable and do not support his position. *See, e.g.*, *Lucky Cab Co.*, 360 NLRB No. 43, p. 22 (2014) (comment made by a low agent employee in response to a question without dissemination); *Battle Creek Health System*, 341 NLRB 882 (2004) (observer asked and responded to question as to how to learn of election results); *Intertype Co.*, 164 NLRB 770 (1967) (one comment of vote yes not made by an observer, but by an employee for whom the ALJ found no evidence he was even on the organizing committee).

"The Board is extremely zealous in preventing conduct which intrudes upon the actual conduct of its elections." (HOR 9) (quoting *Brinks, Inc.*, 331 NLRB at 47). The integrity of the voting process needs to be preserved, especially in close elections, or else the validity of the results and the Board's neutrality come into question. This was a very close election, especially after accounting for objected ballots. The Board has held that "party electioneering during the voting, and indeed in the election room, is a serious interference with the election process." *Brinks*, 331 NLRB at 46-47. The Board cannot ignore this misconduct. Llarull electioneered from the observer table, and employees knew it. The election results are tainted, and the Board must preserve the integrity of the vote. Objection 1 should be sustained.

B. Objection 2: Election Surveillance

During multiple election sessions held on December 4, 2015, bargaining unit employees observed Union agent and organizing committee member Carmen Llarull (when not acting as an observer), other off-duty pro-union bargaining unit employees, and an unknown individual in Union clothing conducting surveillance to determine which employees were voting and not voting and likely engaging in electioneering activities in areas near the polling area. Specifically, Llarull and the others were stationed in the Hotel's service elevator landing area, which is immediately outside the service elevators which bargaining unit employees must utilize to access the polling area and immediately adjacent to the hallway where voters lined up to vote. The Company notified the Board Agent who declined to police the service elevator landing area during the voting hours. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

1. Summary

Employee access to the voting room was through four employee service elevators which shared one landing. (Tr. 188, 519-20, 1131-32, 1134; ER 19, 33-34; P 28, p. 33 of 44, Level 3 No. 17). The entrance to the service elevators was only 31 feet from the room where the election was held. (Tr. 1130; ER 19, 33-34).

During the first day of voting numerous witnesses -- Mariscal, Gelardi, Albano, Salazar, Ascencio -- testified to the presence of Committee Leaders and/or Union supporters camped out in the elevator landing surveilling employees as they exited to vote and returned. Two Committee Leaders, Wise and Erlinda, were specifically named by employees as having been involved. (HOR 11; Tr. 521, 522-23, 606, 653, 1135-36, 735-37, 119; ER 24). Employer Counsel complained about this activity after the morning voting session, but Board Agent Anzaldua said that because it was not within his line of sight he would not patrol the landing area. (HOR 11; Tr. 223-25, 269). The Union failed to call Wise or Erlinda to testify as to their conduct. (Tr. 119).

The RD and HO did not dispute these facts. (DCR 5; HOR 11). Both omitted, however, several undisputed facts which are relevant to the analysis:

- The morning session, in particular the first half, was particularly busy. (Tr. 278). More than 100 employees voted in that session. (Tr. 2291).
- Mariscal exited the elevator with three other employees. (Tr. 520-21). When she returned some ten minutes later Wise was still in the landing. (Tr. 568).
- The elevator landing was not a designated rest area, so employees would have no reason to be loitering in that area. (Tr. 522).
- Given Wise had no reason for being there, and was attired in full Union regalia, Mariscal assumed he was there to intimidate and influence voters. (Tr. 567-68).
- Gelardi and Albano took the elevator to vote with one to two other employees. (Tr. 606, 652-53). When they returned approximately 10 minutes later, the man they saw in the landing was still there. (Tr. 654-55).
- Salazar returned to the elevator landing approximately 15 minutes after she had arrived at the Pool Level and the two Filipinos were still there. (Tr. 735- 737).
- Anzaldua himself caught individuals in the hallway during the election who were not there to vote and told them to move on. The two persons had said that they did not trust security. (Tr. 281-82, 290-93).
- Anzaldua knew employees had to go through the elevator landing to vote. (Tr. 269). But he never went there to respond to the electioneering reports. (Tr. 292).

The HO found that Employer failed to meet its burden to provide specific detailed testimony, and that Employer witnesses testified in a conclusory fashion without any details to bolster their accounts of surveillance and electioneering. (HOR 10). The HO applied the third party misconduct standard. (HOR 13). The HO/RD further determined no one person was in the landing area for a significant period of time, that the people did nothing more than offer cursory greetings to voters, and that even assuming agency status the conduct was insufficient to overturn the election. (DCR 6; HOR 13). The RD did not consider the conduct alleged to rise to the level in *Boston Insulated Wire*, 259 NLRB at 1118, and distinguished Employer's case support as cases involving unfair labor practices committed by an Employer. (DCR 6). An

unfair labor practice involving Section Freights "is not the same as electioneering conduct related to a representation election." (DCR 6).

2. Factual Errors

The HO's characterization of the testimony and the evidence as to surveillance is in error. Mariscal, Salazar, Albano, Gelardi and Ascencio all provided specific detailed testimony as to when they voted, what they saw, who they saw, how many people they were with, what they did, and how long it took. In answers to questions on direct, and on two crosses, the witnesses answered every question raised as best as they could. The people they saw were described and, where they recognized the person, actually named. The testimony, individually and collectively, was more detailed than that of Agent Anzaldua about his encounter with people in the hallway, where he had no recall as to what the people looked like, what they wore, or even all that they said. (Tr. 281-82, 290-93). Moreover, *the employees' testimony was undisputed.*

The RD also claimed the Employer did not prove any of the Committee Leaders were there for more than a very brief period, or that they were engaged in any conduct that would reasonably give the impression to voters that their arrival to vote was being monitored, or that they engaged in any act of coercion. (DCR 6; HOR 13). First, numerous witnesses provided undisputed testimony that, throughout the Friday voting, Leaders and pro-Petitioner employees were stationed in the landing when employees exited the elevator and were still there when, anywhere from 10-15 minutes later, they returned. (Tr. 568, 654-55, 736-37). While employees may have seen them only briefly entering and exiting elevators, that they were present both when employees arrived and exited the Pool Level, at various times during the day, shows they were stationed for more than a "very brief period." (*Id.*). The witnesses testified that they saw these people and that they came off of elevators with others that would have passed them as well. (Tr.

520-21, 605-606. 651-53, 734-35). Moreover, in the morning, in particular, over 100 people voted during the time that Committee Leader Wise was in the landing. (Tr. 2291).

Critically, both the RD and the HO ignored the fact that Petitioner opted not to call Committee Leaders Wise and Erlinda (whom the Union knew (Tr. 119)), to rebut this undisputed testimony of their presence on the landing. Petitioner's failure to call them should have been held against the Union. *See, e.g.*, *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enf'd.* 861 F.2d 720 (6th Cir. 1988) (an adverse inference may be drawn). There is more than sufficient evidence that Committee Leaders and pro-Petitioner employees stationed themselves at the landing for more than very brief periods.

The RD's finding that there was insufficient proof of "surveillance" or an impression of surveillance is similarly flawed. The Committee Leaders' actions were more than enough to demonstrate unlawful surveillance or, at minimum, an impression of surveillance. They were stationed where they had no reason to be, just 31 feet from the polls, such that employees had to pass by them to vote. This is the very definition of surveillance and coercion. Had a Hotel manager done this, the Region would automatically find it to be unlawful surveillance. The unexplained presence of supervisors at points where employees had to pass in order to vote has been found objectionable. *Electric Hose and Rubber Co.*, 262 NLRB 186, 216-17 (1982). *See also Ravenswood Electronics Corp.*, 232 NLRB 609 (1977); *Woodland Molded Plastics Corp.*, 250 NLRB 169 (1980).

Nor can this surveillance be considered in isolation. This surveillance comes at the culmination of months of campaigning where employees were threatened (Section III(E-G), *infra*), photographed and videotaped (Section III(C), *infra*), repeatedly asked who they were going to vote for, and asked to sign a sheet confirming they were voting for the Union and when

(Section III(H), *infra*). In this case, any reasonable employee would see Committee Leaders and pro-Petitioner employees stationed in the landing as surveillance to make sure they voted as the Union wanted. As Mariscal testified, Wise was there to intimidate and influence people as they were going to vote. (Tr. 567-68).

3. Legal Errors

The HO erred by applying a third party standard to Committee Leaders. (HOR 13). While the RD also found the conduct insufficient evidence of unlawful surveillance even assuming agency, the RD similarly erred by his reliance on *Boston Insulated Wire,* 259 NLRB at 1118-19. (DCR 6). First, that case is distinguishable in that the Board found that electioneering, not surveillance, was being conducted in front of an entrance used by employees both going to work and voting, and there was no evidence that this entrance was a "must pass" entrance as the elevator landing was here. *Id.* at 1118.

What the RD cannot really distinguish and what should control this instance of surveillance is the principle that elections should be set aside when a party such as Committee Leaders station themselves in an area where employees "must pass" on their way to vote, regardless of the distance to the polls themselves. *Nathan Katz Realty v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001) (citing *Electric Hose & Rubber Co.*, 262 NLRB at 186); and *Performance Measurements Co.*, 148 NLRB 1657 (1964)), concluding that the cases "seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote."). While *Katz* was an employer misconduct case that involved an unfair labor practice as the RD noted, the case also included election objections, the misconduct also was deemed objectionable (as almost all ULPs are), and the court did not differentiate between employer and union surveillance.

What the HO and RD further failed to recognize or address is the fact that this Board already has recognized the need to address this issue. In *Baker DC LLC*, Case No. 05-RC-135621 (Order, Dec. 28, 2015), the Board recently granted a request for review with respect to the denial of a surveillance objection in which a group of union officials stood near the entrance to the building lobby such that all employees had to pass a few feet from the union agents in order to vote. *See* Attachment A. The very presence of the agents is sufficient to require a new election.

Even assuming a third party standard applied, the RD also erred in its application. Leaders and pro-Petitioner employees were in the elevator landing for a sufficient amount of time to be seen by numerous employees heading to and returning from the polls. Their very presence in a hotly contested election in which Leaders made various threats and in which everyone was asked to commit to vote for the Union and to sign when they were going to vote is enough for any reasonable employee to consider it to be coercive and to create a general atmosphere of fear and reprisal rendering a fair election impossible. *See Nathan Katz Realty*, 251 F.3d at 993. This surveillance was objectionable and constituted grounds to overturn the election results.

C. Objections 4 and 13: Photographs and Videotaping

4: [a] Prior to the election, Union agent and organizing committee member Celia Vargas photographed and threatened to report a bargaining unit employee who opposed the Union to the Occupational Health and Safety Administration ("OSHA"). [b] Prior to the election, Union agent and organizing committee member Carmen Llarull photographed employees who engaged in anti-union activities and threatened to have one employee who was opposed to the Union arrested for engaging in anti-union activities. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

13: Shortly before the election, Union agent and organizing committee member Carmen Llarull and others engaged in surveillance, photographed, and, in some instances, recorded pro-Hotel employees in the EDR and other areas of the Hotel

without their permission -- including at times when they were exercising their Section 7 right to engage in protected concerted activities opposed to the Union. Other employees attending a rally while exercising their statutory right to display pro-Hotel signs also were recorded by unknown Union activists and had their images circulated through an online message board. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

These objections generally involve either the actual taking of photographs or video or the creation of an impression of the same by pro-Petitioner employees of employees who opposed Petitioner, in some instances accompanied by other improper conduct.

1. Objection 4(a): Vargas Bottle Photos

a. Summary

Committee Leader Celia Vargas photographed Michael "Tommy" Tomasello, a guest services employee active in opposing the Union. (HOR 16). Tomasello, who spent the day before the election in the employee dining room ("EDR") handing out anti-union fliers and campaigning against the Union, was photographed repeatedly while seated at a table in front of some disinfecting chemical spray bottles, used by housekeepers, that are not permitted in the EDR because they are poisonous. (HOR 14; Tr. 1279-88, 1591-92, 1593, 1595,1671; ER 37 at 1:12:48:268 - 1:13:22:868). Vargas also forwarded the photos to Committee Leader Llarull. (HOR 14; Tr. 1593). Llarull, during this period, also took photos of Tomasello. (Tr. 2419-23; ER 40, ER 37 at 1:13:01.768, 1:13:15.568, 1:13:20.568). The photos were taken in a dining room containing numerous other employees. (ER 37 at 1:12:48:268 - 1:13:22:868).

Later that afternoon Vargas showed Tomasello the photos, told him that she had "gotten" him, and that she was going to report him to OSHA. (Tr. 1282-83, 1298-99, 1318-22; ER 21 at 4:41:08:070 - 4:41:29). Tomasello told her that he had no idea what she was talking about, that those were not his bottles. (Tr. 1282, 1299; ER 21 at 4:41:29). He asked why she was taking him to OSHA, what for? (Tr. 1299, 1321-22). Vargas said that it did not matter. This was

going to OSHA and they were going to know about you. (Tr. 1282-83). Vargas said this in a non-joking manner. (Tr. 1283). Tomasello was not familiar with OSHA rules, and took her comments to mean that she was going to report him and there might be some sort of penalty on him. (Tr. 1283).

The HO found that the photos had been taken and shown to Tomasello, but credited Vargas' testimony over that of Tomasello because it allegedly was "detailed, forthcoming and straightforward." (HOR 14). Vargas denied threatening to report Tomasello, and claimed that she simply told Tomasello that, despite his claims he was an intelligent university student, he did not know the bottles could not be on the table and that Employer could be fined by the Department of Health. (HOR 14; Tr. 1596-97). The HO thus concluded, *inter alia*, that Vargas had not threatened to report Tomasello "to the Department of Health" for having disinfectant bottles at his table in the EDR. (HOR 15-16). The HO further found no evidence of dissemination beyond the employees involved. (HOR 18).

b. Factual Errors

The HO errantly failed to credit Tomasello's detailed, forthcoming, and specific testimony that Vargas told him that she had "gotten" him, and that she was going to report him to OSHA. (Tr. 1282-83, 1298-99, 1318-22; ER 21 at 4:41:08:070 - 4:41:29). The HO's underlying sole stated basis for crediting Vargas over Tomasello is that her testimony allegedly was "detailed, forthcoming and straightforward." (HOR 14). She did not address, much less compare, the demeanor of the witnesses or, for that matter, compare the details of Tomasello's testimony to Vargas' testimony. As such, the Board need not give any presumption to the HO's credibility determination. See Section II(C)(1), *supra*.

Critically, the HO failed to recognize the multiple inconsistencies in Vargas' testimony showing it should not be credited. First, Vargas' claims that somehow Tomasello violated the

rules (OSHA, Department of Health, or otherwise) is difficult to accept given the disinfectant bottles were already in the EDR before he arrived, of which the video shows both Vargas and Llarull were well aware. (HOR 14; Tr. 1273-74,1277,1316-17,1664,1665; ER 37 at 12:30:38:292, ER 37 at 12:31:27:90, ER 37, 1:12:16.568-1:12:33.568, ER 37 at 12:32:34.090, 12:39:22.687, 12:40:12.087, 12:40:17.087). Second, Vargas was not truthful in her claims that the photos she took and sent to Llarull were the ones produced at hearing. (HOR 14; Tr. 1592-93). A review of the photos and the video of Vargas taking photos and Llarull with her camera conclusively demonstrates that the bottle photos produced at hearing were indeed taken by Llarull. (HOR 14; Tr. 2419-23; ER 40, ER 37 at 1:13:01.768, 1:13:15.568, and 1:13:20.568).

Third, the record does not support Vargas' claimed backstory as to how she came to take the photos. As the HO reported, Vargas claimed she took the photos after Tomasello asked her to sign a document without seeing it and then proceeded to walk around the EDR making disparaging comments regarding the Committee Leaders. (HOR 14). While Vargas' testimony may have been "detailed," it also was demonstrably false. The video shows Tomasello arriving at around 12:30 p.m. and, after placing a pile of fliers at his table, handing a copy to Committee Leader Menjivar at the Committee Leader table (ER 37 at 12:31:34.890 - 12:31:37.979) before handing out the guarantee sheets to others. (ER 37 at 12:31:34.890 - 12:40:58.903). There is no indication from the video that, at any time prior to the photos being taken, Tomasello withheld a flier from Vargas or even approached the Committee Leader table (or Vargas specifically) after he handed them out to try to get Vargas to sign the document without seeing it. (ER 37). For all of Vargas' claims Tomasello loudly stomped through the EDR attacking Committee Leaders, the video shows nothing of the sort. (ER 37). Committee Leader Lourdes Rivera, who was in the EDR over the same lunch period (Tr. 2169), just saw Tomasello moving around and laughing,

and at no time during that day did she hear him say that he was going to college, or any bad things about housekeepers as Vargas alleged. (Tr. 2184-86). The video evidence and other testimony completely contradicts Vargas' story.

Fourth, Vargas has additional credibility issues. Vargas claimed: (i) Llarull was not there when she took the photos, when she clearly was (Tr. 1655; ER 37 at 1:12:45.168 - 1:13:22.068); (ii) she did not want to keep a record of the bottles, yet somehow sent the photos to Llarull (Tr. 1654); and (iii) she sent "many photos" to Llarull to put onto a disc because there was not enough space on Vargas' phone to save any more pictures, yet Vargas admittedly never received such a disc from Llarull and Llarull testified only to receiving the bottle photos. (Tr. 1654, 2416-17).

The HO erred by failing to find that these facts contradict and discredit Vargas, fatally undermining Vargas' credibility under any review standard. These clear problems with Vargas' testimony are so significant as to render arbitrary the HO's conclusion that Vargas did not threaten to report Tomasello to the authorities, be they the Department of Health or OSHA. To the extent that the HO attempted to bootstrap her conclusion by noting that, as of the date of her testimony, Vargas had not reported Tomasello to the authorities (HOR 14), this is to rely on an irrelevancy, no different from an employer claiming it should not be found to have threatened an employee with discharge because the threat was not carried out.

2. Objections 4(b) and 13: Llarull-Related Photos

Objection 4(b) and Objection 13 essentially involve the photographing or videotaping or threatened videotaping of anti-Petitioner employees Tomasello, Cicutto, Gonzales, Ascencio, and Ramos (HOR 16; Tr. 1162-63), by Committee Leaders, primarily Llarull, as well as certain other improper conduct profiled below.

a. Cicutto

i. Summary

Pool ambassador Mike Cicutto, while removing pro-Union signs from the hallways the morning prior to the election, believed he was photographed on more than one occasion. (Tr. 1081). Leaders Llarull, Menjivar and an Asian woman had been posting the signs. (Tr. 1079-80, 1082; ER 3). Once, while Cicutto was removing a sign posted near the time clock outside of human resources, Leader Menjivar had pointed her phone at him and he heard the sound of the camera function going off. (Tr. 1082). He also saw Leader Llarull with her phone pointed at him and her camera function on as if she were taking a photo of him. (Tr. 1083-84, 1090; ER 8 at 12:16:32.427 - 12:16:39.427). While Cicutto was removing union signs he never intentionally damaged any government notice posting, although unbeknownst to him at some point he accidentally tore the corner of one settlement notice poster. (Tr. 1080, 1117).

Llarull, not happy with Cicutto taking down union signs, complained to Cicutto on several occasions about him taking her signs down. (Tr. 1090; ER 8 at 12:16:04.927). She told Cicutto that he was going to be arrested, that it was illegal for him to take the signs down, and that she was going to call the police. (Tr. 1084). Cicutto just told her "OK", and continued to remove her signs. (Tr. 1084). Cicutto never called Llarull names. (Tr. 1085). He did not call her "stupid," a "stupid bitch," say "Fuck you son of a bitch," or say she was in housekeeping because she was stupid. (Tr. 1085, 2584, 2586).

Llarull was heard by housekeeping employee Minerva Salinas talking to someone on the phone further accusing Cicutto of being General Manager Brian Baudreau's nephew, saying that Baudreau sent Cicutto down to rip off her signs, and claiming she was calling the police on them. (Tr. 1085, 2602, 2613). Llarull also told Housekeeping employee Vania Mariscal, who had helped repost the government posting: "And I'm going to call the cops on you. They're going to

come right now and they're going to pick you up, because you took down a notice of election flier down." (Tr. 538). Llarull also told her that she was going to call the police on Cicutto. (Tr. 539, 551-52). Llarull told Mariscal that it was a federal announcement to all of the employees that had been taken down, and that that it was the threat of removing a government poster from the wall that Llarull was referring to. (Tr. 552).

Cicutto had never been threatened with arrest, did not know what rules were in place for people engaged in Union activities, and believed possibly he could be arrested or receive some sort of citation for removing the Union signs. (Tr. 1116-17, 1124-25). When Salinas first heard what Llarull was saying, she thought Cicutto and Mariscal were going to be arrested because Llarull was very serious, and even followed up with Marsical later that day to see if the police were coming. (Tr. 2615-16).

The HO simply restated the witnesses' testimony, noted that Llarull and another Leader, L. Rivera, alleged Cicutto at one point swore at them, and found that even if, as alleged, Llarull had threatened to have Cicutto arrested it was incredible that Cicutto, Mariscal or Salinas would take such threats seriously. (HOR 16).

The RD took administrative notice that the Board Notice directed persons with questions or complaints to the "Compliance Officer." (DCR 5-7). From that, he opined an employee might reasonably believe it was appropriate to report a defaced notice the police, and that employees could be held responsible for defacing notices. (DCR 7). The RD did not consider the threat to report someone to be objectionable, for it would prevent employees from cooperating with Board proceedings. (DCR 7).

ii. Factual Errors

The HO's "[e]ven if, as alleged" attempt to minimize the credibility of this testimony regarding Cicutto is in error, as the factual allegations are precisely what occurred. (HOR 16).

The RD further erred in implying it was possible Cicutto may have used offensive language towards Llarull and L. Rivera. (HOR 15). Cicutto denied it (he said "OK"). (Tr. 1084-85, 2584, 2586). Moreover, Llarull is simply not credible. See Section II(C)(2), *supra*. Llarull's claimed statement that Cicutto called her a stupid bitch that has no brain (Tr. 115) conflicted with L. Rivera, who provided several different versions of events. First Rivera claimed Cicutto "screamed" at Carmen, "Fuck you, son of a bitch" from 20 feet down the hall. (Tr. 2119; 2122, ER 8, 12:16:49). Then she claimed that he had turned his head and spoke in a low voice, that she only saw his lips moving, but heard words coming out of his mouth, and that could not hear the words and only could tell what he was saying. (Tr. 2122, 2123, 2124, 2173-74, 2175). Rivera said she was behind Llarull at the time, and had no classes in lip reading. (Tr. 2124, 2176). She also later claimed she actually did hear him. (Tr. 2176). Neither Llarull nor Rivera can be credited on this, which no doubt is why the HO only said it appeared Cicutto may have said something. (HOR 15).

b. Tomasello, Cicutto, and Gonzales in the EDR

i. Summary

The day prior to the election, anti-Petitioner employees Tomasello, Cicutto, and Madison Gonzales were seated at a table in the EDR. (Tr. 1275, 1286-87; ER 21). Llarull, Menjivar, and other Committee Leaders were seated at a table across from them. (Tr. 1286-87; ER 21). Llarull took photos of the anti-Petitioner employees. (Tr. 316-17, 1289-91; ER 21 at 4:34:44:572, at 4:34:45.472 - 4:34:49.772; ER 26).[11] Gonzales saw Llarull taking pictures and pulled out her phone to take a photo of Llarull. (Tr. 304; ER 21 at 4:35:09.672). Gonzales showed her picture to Cicutto and Tomasello, asking them why Llarull was taking pictures of her. (Tr. 319, 1290).

[11] Earlier that day she also took photos of Tomasello while he was seated in front of the spray bottles. (Tr. 2419-23; ER 40, ER 37 at 1:13:01.768, 1:13:15.568, ER 37 at 1:13:20.568).

Tomasello and Gonzales asked Llarull why she was taking their pictures. (Tr. 304, 1324). Llarull said things like "I've got you" and "Everyone is going to know," with her phone in her hand. (Tr. 1292-93,1295; ER 21 at 4:39:06.370 - 4:39:20.870). Tomasello replied that if Llarull was going to take their pictures, she should get a better shot of him, and he and Cicutto began posing for pictures. (Tr. 1294, 1296; ER 21 at 4:39:54).

On December 4, the first day of the election, Tomasello and Gonzales were seated at a table in the EDR near Llarull. (Tr. 306-07, 1291-92; ER 22). Gonzales observed Llarull lifting up her phone as if she was taking a picture and then putting down her phone, with its camera function on. (Tr. 307, 324-25; ER 22 at 3:46:00.312). Gonzales then took Llarull's photo. (Tr. 324-25; ER 22 at 3:46:00.312 - 3:46:46.12). A few minutes later, Llarull picked up her phone and appeared to take Gonzales' photo. (Tr. 326; ER 22 at 3:48:06.212 - 3:48:31.812, ER 25). Gonzales then took another picture of Llarull. (Tr. 327; ER 22 at 3:48:41.112). Gonzalez, upset at the repeated photos, felt her privacy was violated, feared what would be done with the photos, and filed a complaint with Human Resources. (Tr. 309-10; ER 20, 25).

The HO found that after viewing the video evidence for both of these events on December 3 and 4, it was clear that employee Llarull took photos as alleged. (HOR 16). The HO found, however, that the posing for pictures by Cicutto and Tomasello demonstrated that even if Llarull made any threats to them as Tomasello alleged, that Cicutto, Tomasello, or Gonzales hardly took them seriously. (HOR 16).

ii. Factual Errors

The HO erred by failing to recognize that the record is clear that Llarull provided no explanation for her photographing of Tomasello, Cicutto, and Gonzales in the EDR on December 3 and 4. Indeed, when Gonzales asked why Llarull was taking pictures of her, "Llarull said things like 'I've got you' and 'Everyone is going to know,' with her phone in her hand." (Tr.

1292-93; ER 21; HOR 16). Rather than recognizing this clear violation, the HO discounted the offense by saying that Gonzales took pictures as well and the employees went so far as to pose for pictures, as if they did not take Llarull's threats seriously. (HOR 16). However, as the HO found, Llarull initiated the photos on both days. (HOR 16). That Gonzales also took photos in response is irrelevant given that she is not Employer's agent and had every right to photograph activity she considers offensive. The record also shows the employees posed for photos because they were fed up with the photo taking. (Tr. 1292-94, 2590). That is a far cry from saying the Committee Leaders' conduct was not taken seriously. Faced with threatening conduct people commonly attempt to show that they are not be intimidated.

c. Video of Ascencio

i. Summary

It is undisputed that anti-Petitioner employee Ascencio was present at a Petitioner rally attended by Hillary Clinton on October 12, where he waved a www.trumpunionfree.org sign given to him by employee Tomasello to show Ascencio's support for employees who did not support the Petitioner. (Tr. 868, 1767-79, 2388). While moving his sign, Ascencio noticed Llarull pointing her camera phone at him. (Tr. 869-70). Llarull took video of Ascencio. (Tr. 2381; ER 41). About one week later, housekeeping employee Natividad Ramirez (Ramirez) showed Ascencio a group text message on her phone with a link to the video with him waving the sign at the rally. (Tr. 871, 896). Ramirez told him that the video was Llarull's and it had been sent to others who supported the Petitioner. (Tr. 899, 912, 931). At the hearing, Ascencio identified the video Llarull produced from her phone as the video he had seen on Ramirez's phone. (Tr. 2714, 2721-22).

The HO found that Llarull videotaped Ascencio, but implicitly credited Llarull's denial that she did not email the video to anyone over Ascencio's testimony that Ramirez showed him a

group text message of the video. (HOR 17). The HO claimed Ascencio exhibited confusion and inconsistency in his testimony, particularly regarding dates (testifying the rally occurred in August), the duration of the video (testifying it lasted a couple minutes versus its actual duration of a few seconds) and the details of the www.trumpunionfree.org website identified on his sign during the rally, a site which he testified he did not visit until November. (HOR 17). The HO also noted the person who showed Ascencio the video was not asked about it. (HOR 17).

ii. Factual Errors

The HO's credibility findings cannot be supported. That a witness has trouble placing a specific event or how long a video clip lasts does not deprive his testimony of credibility. *See* Sections II(A), (C)(1), *supra.* Ascencio testified consistently and in great detail as to what happened at the rally, and how it was he learned that he had been videotaped. (Tr. 868-71, 890, 892-94, 923, 925-29, 930-32). What the HO is doing is actually crediting Llarull's denial she sent the video over Ascencio, without any discussion of evaluating her credibility over his. *See* Sections II(A), (C)(1), *supra.* The record is clear that Llarull's recall of details was worse than any other witness and she repeatedly lied throughout her testimony. *See* discussion Section II(C)(2), *supra.* She cannot be credited. Moreover, there would have been no way for Ascencio to know he was being videotaped as opposed to photographed without having seen the video at some point. Indeed, he testified he first assumed she took his photo. (Tr. 869). Yet he was able to testify clearly, before the video was ever produced by the Union, as to what he saw in the video.[12]

[12] While the person who showed him the video testified before he testified, and was not asked by either party about the video, that has no bearing on Ascencio's credibility. Moreover, Ascencio testified that Committee Leader Pedro Martinez was copied on the text, and was in the room when he was shown the video. (Tr. 931-32, 1691-92). Petitioner called him as a witness, and notably never asked him about the incident. (Tr. 1691-99). There is no basis to credit Llarull here.

d. Ramos Video Threat

Around November 28, in the EDR prior to an employee meeting, Housekeeper Susana Ramos and Committee Leader Llarull had a heated discussion regarding the upcoming representation election. (Tr. 1644, 2683-84, 2655). During this exchange Ramos touched Llarull's arm with two fingers. (Tr. 1175). Llarull warned Ramos not to touch her because she was being recorded. (Tr. 1176). Ramos recalled Leader Rivera had her cell phone on the table as if to record Ramos. (Tr. 1176-78). Leader Vargas admitted to taking out her phone to try to take pictures of Ramos. (Tr. 1588-89, 1645-46). Rivera admittedly told a coworker to take a video of Ramos with her phone. (Tr. 2130). The HO did not take issue with testimony, although she went on to state that there was no evidence that any photos or videos were actually taken. (HOR 17).

3. Legal Errors

The HO erred by applying a third party test when the party test should have been applied, and by applying a subjective test to determine whether conduct was objectionable. (HOR 16, 17). *See* Section II(A), *supra*. Applying the correct standard here, and even under a third party standard given the threats, the election must be set aside.

The HO and RD inexplicably failed to apply or address Board precedent directly on point, the decision in *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) ("*Randell II*"). There, the Board held that "the unexplained videotaping or photographing [of employees] was objectionable even if not accompanied by and threats or other coercive conduct." *Id.* at 594. In reaching this conclusion, the Board looked to the three-part rationale underlying the rule articulated in *Waco, Inc.*, 273 NLRB 746 (1984), that unexplained *employer* photography of Section 7 activities has a tendency to intimidate employees and then noted that the same three

Waco factors are present when a union is taking the pictures of employees engaged in Section 7 activity.[13] *Id.*

The record is undisputed that either actual videotaping or photography or creating the impression of the same was present with respect to each of these objections. (HOR 15-18). With respect to the Ramos, while there was no evidence of any actual recording, the HO found facts that would cause any employee to reasonably believe they were being photographed or videotaped. (HOR 17).

As in *Randell II*, no employee was given a legitimate reason for the photographing or videotaping. With respect to Objection 4(a), the HO found that Vargas took the pictures because disinfecting chemicals were not permitted in the EDR and further found, in essence, that Vargas explained this to Tomasello. (HOR 14). This finding is based on the HO's crediting of Vargas' testimony over that of Tomasello, which, as discussed above, is erroneous. The credible evidence is that Vargas told Tomasello that it "didn't matter" whether the bottles were his or not when she threatened to report him to the authorities, and therefore Vargas did not offer a legitimate reason for her photographing of Tomasello. (Tr. 1282-83).

With respect to Llarull's photographing of Cicutto in the hallway on December 3, Llarull offered an explanation, but one that was unlawful: because she intended to report him to the police for removing Union propaganda. (Tr. 539, 551-52, 1084, 2602, 2613). In short, Llarull,

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[13] The HO further erred in finding that *Friendly Ice Cream Corp.*, 211 NLRB 1032, 1033 (1974), *enf'd*, 503 F.2d 1396 (1st Cir. 1974), applied, that Vargas' and Llarull's behavior was protected, and that *White Oak Manor*, 353 NLRB 795, 801 (2009), applied. (Report 18). Both cases dealt with the conduct of employees who were not agents of the Union, which the Employer argues is not the case here. *Friendly Ice Cream Corp.*, did not involve union agent conduct, but employee conduct, and it was decided under the third-party standard of whether an atmosphere of fear and coercion was created. Likewise, the employee in *White Oak Manor* had no union affiliation whatsoever and was not taking photos of employees who were opposed to the union or engaged in protected concerted activities. Here Committee Leaders, agents of the Union, engaged in taking photos of anti-Union employees without providing any legitimate explanation. Moreover, in this case Vargas and Llarull both expressly threatened employees with reprisals as well. *Randell II* applies.

who was unhappy with Cicutto taking down her signs,[14] did not merely photograph and complain; she told him that it was illegal for him to do so and that he would be arrested. Such a threat is clearly coercive. *See, e.g., Hartman and Tyner, Inc.,* 361 NLRB No. 59, slip op. at 1 (Sep. 30, 2014) (employer violated the Act by threatening employees with arrest for engaging in protected concerted union activities).

Without addressing *Randell II,* the RD in agreeing with the HO's recommendations took administrative notice that the language on the Board Notice stated that questions concerning the notice or compliance with its provisions may be directed to the Regional Office's compliance officer. (DCR 6-7). The RD attempted to justify and excuse Llarull's conduct by claiming that because an employee may not know who a compliance officer was, they may think the appropriate action on reporting a defaced notice would be to call the police. The RD then also stated an employee might believe if they altered or defaced a notice they could be held responsible for their actions. (DCR 7). "Under these circumstances" the RD did not consider threatening to report someone for defacing a notice to be objectionable conduct. The RD also believed that making such threats objectionable somehow would result in employees not cooperating with Board proceedings. (DCR 7).

The RD's findings are nonsensical. First, as noted, Llarull's primary issue and complaint lay with the removal of union signs, not the fact a corner of a government poster got torn off. Second, Llarull never claimed that she was confused as the RD assumed an employee might be to believe the proper response to this would be to call the police: She outright *denied* threatening to have Cicutto or Mariscal arrested or to having the police called. (Tr. 2370, 2380). The RD is

[14] As noted above, at one point Cicutto inadvertently loosened the corner of one of the copies of the Board Settlement because the tape securing the Union materials was attached to that as well. While Llarull objected to this as well, it is clear her fundamental objection was to Cicutto's removing of her pro-union materials, which was an independent focus of her threats to have him arrested.

not crediting her explanation, but instead contrary to the evidence he is creating an excuse for her out of whole cloth. Third, that a party should not photograph and threaten anti-Petitioner employees does not somehow prevent them from reporting misconduct. Fourth, the RD's suggestion that it was reasonable to believe that persons who alter or deface Notices can be held responsible for those actions is inconsistent with the HO's finding, adopted by the RD, that there was no reason for Cicutto to fear being arrested. (HOR 16). The Region cannot have it both ways: It cannot say that it would be reasonable for Llarull to contact the police but unreasonable for Cicutto to fear Llarull would have him arrested. Further, Llarull had no legitimate explanation for threatening to have Cicutto arrested. That the threat had *nothing* to do with protecting the sanctity of the government's notice is clear from Llarull's own conduct; she stopped just short of totally tearing down the notice. Her intention was clear: It was to coerce the exercise by Cicutto of his right to oppose Petitioner, a coercive threat that even the HO's report and the RD's tortured attempt to explain away cannot transmogrify into innocent conduct.

Cicutto aside, the record is clear that Llarull provided *no explanation* for her photographing of Tomasello, Cicutto, and Gonzales in the EDR on December 3 and 4.[15] Indeed, when Gonzales asked why Llarull was taking pictures of her, "Llarull said things like 'I've got you' and 'Everyone is going to know,' with her phone in her hand." (Tr. 1292-93; ER 21; HOR 16). Rather than recognizing this clear violation, the HO discounted the offense by saying that Gonzales took pictures as well and the employees went so far as to pose for pictures, as if they did not take Llarull's threats seriously. (HOR 16). However, as the HO found, Llarull initiated the photos on both days. (HOR 16). That Gonzales also took photos in response is irrelevant given that she is not Employer's agent and had every right to photograph activity she considers

[15] Nor was any explanation given for Menjivar photographing Cicutto, or Llarull photographing Tomasello sitting with the spray bottles.

offensive. The record also shows the employees posed for photos because they were fed up with the photo taking. (Tr. 1292-94, 2590). That is a far cry from saying the Committee Leaders' conduct was not taken seriously. Faced with threatening conduct people commonly attempt to show that they are not being intimidated.

Despite the HO's findings, the record demonstrates that the Committee Leaders, particularly Llarull, created an atmosphere in which employees observed engaging in activity opposing Petitioner could reasonably anticipate being recorded, and not for benign purposes. In this regard, as the Board observed in *Randell II*:

> [T]he Board's administration of the Act, as well as the legislative history of the Act, shows that unions … have ample means available to punish employees, and some unions have used that power in reprisal against employees who oppose them in organizing campaigns.
>
> Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them.

347 NLRB at 594 (citations omitted).

Moreover, despite the RD's claims otherwise, there was widespread dissemination: (i) at least four employees were recorded or were told they were being recorded; (ii) the recording in the EDR, particularly on December 3, was done in the presence of numerous employees (ER 37 at 1:12:48.268 - 1:13:09.768; ER 21 at 4:34:44:572 and 4:34:45.472 - 4:34:49.772); and (iii) the Ascencio video was taken at a rally where numerous employees were present, and was texted by Llarull to a group of co-workers. (Tr. 871, 896, 899, 912, 931). The photographing and associated comments by the Union and its agents without any explanation is objectionable. The HO and RD erred by ignoring *Randal II*. The Board should accept review to enforce *Randall II* or, if it disagrees with the decision, define the controlling standard.

D. Objection 6: Surveillance in EDR

Shortly prior to the election, Union agent and organizing committee member Carmen Llarull and other Union supporters coerced bargaining unit employees by patrolling the EDR and creating a written list of the names of those employees wearing pins opposing the Union and those refusing to wear a pro-Union button.

1. Summary

About two to three weeks prior to the election, anti-Petitioner employee Tomasello noticed a female Committee Leader observing who wore what buttons in the EDR. (Tr. 1264-67, 1267-68, 1312-13). Tomasello observed one individual carrying around a pad and looking at people. (Tr. 1269). He also saw them looking at people's name tags and writing in a book. (Tr. 1270).

As addressed (*see* Section II(B), *supra*), a pro-Petitioner supporter in the presence of Leader Llarull had told employee Ascencio and other employees that they [the Union] were making a list of the people who did not support the Petitioner so they would not represent them when the Petitioner won. (Tr. 878-81, 911). Committee Leaders admittedly were reporting to the Union on the Union proclivities of employees. (Tr. 217, 424, 954, 1984, 1484, 1498, 1491-92, 1539-40, 2437-38, 1992-95, 2015).

The HO, as adopted by the RD, did not credit the testimony of either Tomasello or Ascencio as to this issue, claiming their testimonies were vague and speculative. (HOR 18). She further applied a third party standard and found that even if what was alleged was true, Board law permitted Petitioner to monitor and poll employees. (HOR 19). *In re Enterprise Leasing,* 357 NLRB No. 159, slip op. at 2 (Dec. 29, 2011).

2. Factual Errors

The HO improperly discredited the testimony of Tomasello and Ascencio without any reference to demeanor, yet failed to weigh the credibility of the Union's contrary witnesses and

resolve any conflicts in testimony. The Board will not hesitate to overrule credibility determinations and make its own determinations when credibility is not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. *See* Section II(C)(1), *supra*.

Tomasello's only lack of specificity was that he could not identify the individuals he saw by name, because he did not recognize them or recall the exact date and time this occurred, even though he testified it was two or three weeks before the December election. (Tr. 1267-68). This does not render his testimony so "vague and speculative" as to be unworthy of credence. To the extent the HO believed he was not sufficiently specific, she erred by discrediting his testimony despite his sincere efforts to testify accurately. *See* Section II(C)(1), *supra*. Notably, the HO did not find that Tomasello was evasive or contradictory. *See Paragon Systems, Inc.*, 362 NLRB No. 182, slip op. at 3. Nor should what Tomasello saw be surprising given the Leaders' responsibility for monitoring union support.

Ascencio's testimony could not, under any definition, be considered vague or speculative because he testified as to the time of the day the threat was made, where, what was said, and who was present. (Tr. 878-881). The fact that Ascencio approximated a date in June 2015 – over six months prior to testifying – and did have some confusion as to timing of events, similarly should not render his testimony "vague and speculative" where he clearly recalled the specific time of day of the conversation and others who were present. *See* Section II(C)(1), *supra*. Moreover, the only witness put forward to counter Ascencio, Llarull, had worse recollection and was caught in so many lies and half-truths as to have no credibility. *See* Section II(C)(2), *supra*.

The HO erred in tacitly crediting the Union's witnesses like Llarull over Ascencio by simply discrediting the Hotel's witnesses on some recollection issues. Ascencio's and Tomasello's testimony should be credited, and the HO's credibility determinations rejected.

3. Legal Errors

First, the HO erred by applying a third party test. Second, the HO failed to consider the totality of the circumstances and misapplied *In re Enterprise Leasing Co.*, 357 NLRB No. 159, slip op. at 2. (HOR 19). While the Board in *Enterprise Leasing* carefully cautioned that "union polling is *generally* recognized as lawful activity," this falls far short of the hard and fast rule espoused by the HO.

The record as a whole shows that the polling here was part and parcel of a general atmosphere of threats and coercion, which interfered with employees' exercise of free choice. Committee Leaders were seen checking employees' names in the EDR and writing them down in the midst of a heated election where employees were being told: (i) they will not be protected or represented if they do not support the Union, and (ii) the Union is making a list of people that were not supporting the Union so that the Union would not represent them when they won. Polling in this atmosphere is just the paper and pencil version of unlawful photographic surveillance without any explanation. *See Randell II*, 347 NLRB at 594. Such conduct would be objectionable if engaged in by the Hotel and should be equally objectionable when engaged in by the Union. Objection 6 should have been sustained.

E. Objection 7: Threats

Prior to the December and previously scheduled June elections, Union agent and committee member Carmen Llarull threatened that employees who did not support the Union or who wore anti-Union or pro-Hotel buttons would not, if the Union won the election: (i) be protected or represented by the Union; (ii) be protected from discipline; and/or (iii) receive the benefits the Union obtained for Hotel employees. Similarly, Union agent and committee member Pedro Martinez repeatedly told an employee prior to the December election that, if she did not vote for the Union, the

Union would "get her out" of the Hotel and not represent her. Union supporter Natividad Rodriguez told an employee just prior to the December election that it was "a shame" the employee was wearing an anti-union button because those who wore anti-union buttons would not be supported by the Union and would be "run out" of the Hotel or fired if the Union was elected. At least one other Union agent, a Cuban possibly named Mercedes, similarly told an employee during a home visit that if the employee did not wear a Union button she would not be protected by the Union. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

1. Summary

Up to and including two weeks before the election Committee Leaders, Llarull repeatedly told Housekeeper Perez that if Petitioner won, Petitioner would not protect her if Perez did not wear a Petitioner button and support Petitioner. (HOR 19-20; Tr. 430, 436). Llarull told her that if she wore a Petitioner button, she would be protected from discipline and/or termination and would receive better benefits and a higher salary. (HOR 20; Tr. 430, 438-39). Committee Leader Martinez also told Perez, prior to the December 2015 election, that if she wore Petitioner's button, she would be protected and would receive better benefits and a higher salary. (HOR 20; Tr. 436, 438-39).

Prior to the election, Committee Leader Llarull told employees in the presence of employee Mariscal that if they wore the Petitioner's buttons, in six months they would be full-time employees, receive health insurance, would be protected in their job and that nothing would happen to them. (HOR 20; Tr. 937).

Committee Leader Llarull told on-call Housekeeper Tiffany Jones if Petitioner was elected, on-call employees would be fired and housekeeping managers would be fired because Petitioner's representatives would replace the Employer's managers. (HOR 20; Tr. 1014-15, 1040, 1042-43). The HO found Jones' testimony to be inherently unreliable because Llarull's alleged comment allegedly did not make any sense. (HOR 20). The HO also noted that Jones

discussed these threats with various housekeeping managers, was told that they were not true, and that Jones was not worried anymore. (HOR 20; Tr. 1016-17). Jones admitted she told her coworkers who also had heard these comments to talk to the managers that had told her that Llarull's alleged comments about the Petitioner replacing managers were untrue, which the HO found dissipated any impact from these alleged statements. (HOR 20; Tr. 1046, 1050, 1052-57).

Llarull told on-call housekeeping employee Luz Hernandez (L. Hernandez) that she needed to sign Petitioner's authorization card and wear Petitioner's button so she could have her job protected. (HOR 20; Tr. 1336, 1351, 1353-54). Llarull told her that those employees who did not support Petitioner would be fired. (HOR 20; Tr. 1351). The HO did not credit L. Hernandez's testimony regarding Llarull's alleged threats because she allegedly provided no context, seemed confused, and did not testify with conviction regarding the alleged statements to show she had the requisite knowledge and understanding to provide reliable testimony, even regarding something as simple as to when Llarull allegedly made these statements. (HOR 20).

About a month before the election, Housekeeping Inspector Maria Campos overheard Llarull loudly tell housekeeping employees Elizabeth Moges and Momina Adam on the 27th floor of the Employer's facility that Committee Leader Menjivar was reinstated because she had been supported by Petitioner. (HOR 20; Tr. 952-54). Llarull explained that if employees supported Petitioner, Petitioner would represent them, and that if they wore Petitioner's buttons, nothing would happen to their jobs. (HOR 20; Tr. 952-52). Llarull told these employees that Menjivar had been fired for wearing Petitioner's button but Petitioner was able to get her reinstated. (HOR 20; Tr. 954). Llarull told the employees that, if they did not support Petitioner, they would not be represented and would not be protected at all. (HOR 20; Tr. 954, 968).

The HO, however, credited the testimony of Petitioner witness Adam over Campos, claiming that Adam testified that she had no conversation with Llarull in which Campos was present. (HOR 20; Tr. 2508). The HO further credited Adam's testimony that she did not recall Llarull making any comments like if employees support the Petitioner, the Petitioner will represent them or about how the Petitioner could protect them. (HOR 20; Tr. 2509, 2513). According to the HO, Adam's demeanor appeared forthright and honest and she provided specific, responsive answers to each question she was asked. (HOR 20).

On multiple occasions Petitioner Committee Leaders Daysi Hernandez and Martinez told Public Area Department (PAD) employee Natividad Ramirez that employees who refused to sign Petitioner's authorization card would not be given any benefits and Petitioner would not represent them after Petitioner was elected. (HOR 21; Tr. 831). On several occasions prior to the election, D. Hernandez told her that if she signed the Petitioner's authorization card, then she would have better benefits, but employees who did not sign the card would not receive better benefits and would be the first ones to be fired. (HOR 21; Tr. 805). The day before the election Martinez told Ramirez that it was her last chance to sign an authorization card because if the Petitioner came in, they would "get her out" of the Hotel and would not be able to represent her. (HOR 21; Tr. 805). Ramirez acknowledged that she knew it was immaterial whether she signed the card with respect to whether the Petitioner represented her. (HOR 21; Tr. 832-34). Ramirez understood that if the Petitioner won the election, all of the employees would be treated equally, regardless of their support for the Petitioner. (HOR 21; Tr. 832-34). The HO credited the testimony of Martinez and D. Hernandez, who denied making such statements to Ramirez, because such comments allegedly were clearly contrary to the Petitioner's goals of obtaining more employee support. (HOR 21; Tr. 1698-99, 2546).

Committee Leader Ofelia Diaz told L. Hernandez, during her first week of employment (which was around September 11), to sign the Petitioner paper and wear the button because if Petitioner won, and she did not sign the paper and wear the button, she was going to be fired because that is what happened in another casino. (HOR 21; Tr. 1337-39). About a week before Thanksgiving, Llarull told L. Hernandez and a group of employees that if they did not wear a button, they could not be protected. (HOR 21; Tr. 1351-55).

A couple weeks before the election, Housekeeper Gelardi went with her sister to the uniform room where Committee Leader D. Hernandez worked. (HOR 21; Tr. 598). Gelardi asked D. Hernandez when she would be getting a new uniform, and D. Hernandez replied that Gelardi would get a new uniform when she signed a card for Petitioner. (HOR 21; Tr. 598). Gelardi responded that was discrimination and D. Hernandez then laughed, hugged her, and responded that they would be getting new uniforms in the new year. (HOR 21; Tr. 598). The RD characterized the entire incident as a joke. (HOR 21).

A few weeks before the election was postponed in June, but after election dates had been set, when Ascencio was punching out around 3:30 p.m. with his roommate, coworkers named Edwin and Julio, and Llarull present, pro-Petitioner employee Julio told them that "they" were making a list of the people that were not supporting the Petitioner so "they" would not represent them when the Petitioner won. (HOR 21-22; Tr. 878-881).

Around November 2015, pro-Petitioner employee Rosa, who had just been sitting at the table in the EDR where Committee Leaders Llarull, Alvarez, Menjivar, and Diaz sat (Tr. 1340-41), approached Luz Hernandez and said, "Luz, wear the button because the bosses are watching you. They are looking for an excuse to fire you." (HOR 22; Tr. 1341). When L Hernandez asked her why, Rosa replied, "I'm just telling you to wear your button." (HOR 22; Tr. 1341).

This brought Hernandez to tears. (HOR 22; Tr. 1341). It upset her to think that even though she was new, the bosses were watching her and they wanted to fire her "because of something [she] didn't know." (Tr. 1342). Immediately after, in the elevator, Hernandez ran into Housekeepers Jacqueline and Beverly Contreras. They asked Hernandez why she was crying. Hernandez explained what happened with Rosa, and the Contreras sisters told her that "couldn't be true" and took her to talk with Housekeeping Manager Morgan Engle. (HOR 22; Tr. 1341). L. Hernandez was visibly distraught and still crying when she spoke with Engle, who assured her that Rosa's comment was untrue. (HOR 22; Tr. 1341-43, 1344-45, 1409-10). L Hernandez felt better after talking to Engle and no longer paid attention to such comments. (HOR 22; Tr. 1341, 1378). Hernandez made a statement of what happened. (HOR 22; Tr. 1343-44, 1409-10; ER 38-39). L. Hernandez also told co-workers what had happened. (HOR 22; Tr. 1389-90).

During the week before the election, sometime after 1:00 p.m., Ramirez was wearing an anti-Petitioner button when Rodriguez, a housekeeping employee wearing Petitioner's yellow supporter button, saw Ramirez's anti-Petitioner button. Rodriguez said that when Petitioner comes in, those without a Petitioner button are going to be the first to be kicked out and they would not be given any benefits. (HOR 22; Tr. 821).

The HO credited Rodriguez's testimony over Ramirez and Ramos. (HOR 22). The RD claimed Rodriguez testified specifically about the details of her conversation with Ramirez around lunch time a couple of weeks before the election in the EDR, admitting that she simply expressed her own personal opinion that she "wished" that employees who were against Petitioner could be excluded from receiving benefits. (HOR 22; Tr. 2278-80, 2282-83). The RD further credited Rodriguez's denial that she told Ramirez that anyone would be fired. (HOR 22; Tr. 2283).

During a home visit, Petitioner Organizer Marie Mitchell told Housekeeping employee Ana Pantoja that she better wear the Petitioner's button because if she was fired from her job and was not wearing the button, there was nothing Petitioner could do for her. (HOR 22; Tr. 780-81, 2092). Mitchell told her that signing Petitioner's authorization card was not enough, and without the button Petitioner could not protect her. (HOR 22; Tr. 781). Pantoja told her coworkers about this exchange and complained to Employer's HR Department. (HOR 22; Tr. 781-82, 794).

The HO credited the testimony of Mitchell, who presented a detailed account of her home visit with Pantoja. (HOR 22; Tr. 2097). According to Mitchell, she told Pantoja that it was important to wear the Petitioner button and that if anything happened to her as a result of wearing it, she could go to the Labor Board. (HOR 22-23; Tr. 2095-2096). The HO further credited Mitchell's denial that she made any coercive statements about whether the Petitioner would represent all employees fairly in the event the Petitioner was certified. (HOR 23; Tr. 2101-02).

Petitioner Organizer Mercedes Castillo told Perez that if she wore the Petitioner's button, Petitioner would protect her, but if she did not wear the button, and she had any problems at work, Petitioner could not do anything for her. (HOR 23; Tr. 430). Castillo also told her that if she wore the button and lost her job, Castillo would get her a job with Petitioner. (HOR 23; Tr. 432).

The HO credited Castillo allegedly because she testified with specificity what occurred during her interaction with Perez. (HOR 23; 2071-73, 2081, 2087). Castillo claimed she asked Perez if she was wearing her Petitioner button. Perez responded that she had requested a shift transfer and was concerned that if she wore her button, the Employer might not grant her request. (HOR 23; Tr. 2072-73). Castillo responded that Perez had a right protected by Federal law to

wear the button, and if the Employer denied the shift because of her wearing the button, then she would be protected by Federal law. (HOR 23; Tr. 2073). The RD also credited Castillo's denial that she promised Perez a job with the Petitioner if she lost her job. (HOR 23; Tr. 2074-75).

The HO dismissed the objections, applying a third party standard to the employees and an agency standard as to the organizers. (HOR 23). The HO found that Employer failed to provide sufficient credible evidence that any threats were made, and even if some were made, Employer failed to meet its burden to show the alleged threats created an atmosphere of fear and reprisal rendering a free election impossible. The HO also did not believe any of the alleged threats made by the organizers reasonably tended to interfere with employees' free and uncoerced choice in the election. (HOR 23).

2. Factual Errors

While the HO sufficiently detailed the threats to which numerous subpoenaed Employer witnesses testified, she then somehow claims these witnesses did not provide sufficient detail and that Employer did not provide sufficient evidence to conclude the threats were made. In so doing, among other errors, the HO credits non-testimony over actual testimony, credits Llarull over every Employer witness, holds Employer witnesses to a far higher standard of recollection than Petitioner or Board witnesses, and otherwise proceeds to ignore their testimony on grounds that cannot survive even a cursory review.

First, given the HO was able to set forth in great detail the testimony of the nine Employer witnesses, each of whom testified to one or more threat incidents, she erred when claiming that their testimony somehow lacked sufficient context or that the evidence was insufficient to conclude threats were made. (HOR 19). Each of these witnesses testified as to who made the threat, where, approximately when the threat was made, and who (if known) was present. (Tr. 430, 436, 438, 529-34, 597-98, 777-82, 805-09, 821-31, 952-54, 1013-15, 1040,

1042-43, 1336, 1341-45, 1351, 1353-54). Some of these threats were repeated over the course of the seven month critical period. Given the witnesses apparently did not record their encounters with Leaders, they sometimes had issues recalling timing and dates. But lack of specific recall as to something like timing or dates do not render their testimonies incredible, especially where the witnesses were otherwise sincere and made an effort to remember. *See* Section II(C)(1), *supra.* The HO also applied a separate standard by ignoring similar, if not worse, recollections by Petitioner's witnesses and Anzaldua. *See* Section II(C)(1), *supra.* The testimony Employer presented as to threats was more than sufficient and detailed for the HO to conclude that threats were made.

Second, by blatantly disregarding the Employer subpoenaed witnesses, the HO implicitly credited Llarull over Perez, Mariscal, Jones, L. Hernandez, Campos, and Ascencio. (HOR 19-22). As discussed, *supra*, Llarull has no credibility whatsoever. Moreover, setting aside her inability to tell the truth, when responding to the threats she made, Llarull provided no specifics and only testified to generalities for many things. (Tr. 2320-23, 2331-32, 2449, 2453, 2355, 2356). Employer's witnesses were far more specific, and also lacked Llarull's significant credibility problems.

To get around the problem of officially crediting Llarull, the HO searched for other ways to discredit Employer witness testimony, but her attempts fail. For example, the HO found that, despite Campos' testimony, Adam credibly denied that Llarull ever made a threat in the hallway. (HOR 20-21). Yet Adam never testified to that. Adam did not "recall" Campos being at such a conversation and did not "recall" Llarull making such comments. (Tr. 2508, 2509).[16] That is

[16] Despite the HO's finding Adam provided "specific, responsive" answers (HOR 20), her recollection was no better than and, if anything, worse than Employer witnesses whom the HO did not credit. Her testimony was littered with

insufficient. *Products Unlimited Corp.*, 280 NLRB at 441; *Offshore Shipbuilding*, 274 NLRB at 539; *Detroit Plastic Products Co.*, 121 NLRB at 504 n.93. The HO erred by crediting a witness who simply did not recall over a witness who testified in detail.

Similarly, the HO found Jones' testimony to be "inherently unreliable" regarding Llarull's comment that on-call employees would be fired and that housekeeping managers would also be fired because the Union representatives would replace them. (HOR 20). The HO's basis for that statement was that Llarull told Jones something the HO considered nonsensical. This does not go to credibility. Not only did the HO fail to apply an objective test to Llarull's threat, but she improperly substituted her own subjective opinion as an experienced NLRB attorney as to the seriousness of the threat for that of Jones, who, as a young, relatively inexperienced on-call employee, had no reason to dismiss Llarull's threats as "nonsensical." Llarull demonstrated on the witness stand that she will say just about anything, even when it contradicts video evidence. L. Hernandez was not credited over Llarull – not because she got caught in repeated lies like Llarull testified to with conviction – but because she did not testify with "conviction" about, yet again, the timing of when Llarull made her statements. This is not sufficient to credit Llarull over Hernandez, much less discredit L. Hernandez as to the other incidents.[17]

As to Ascencio, the HO did not explain how his detailed testimony was not to be credited, even though the only person who arguably vaguely testified in opposition was Llarull. The HO discredited Ramirez over Martinez and Hernandez, not because of any credibility determination or some evidentiary fact, but because in the HO's opinion, threatening employees

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do not recalls, do not knows, an inability to testify as to when events happened or how often, etc. (Tr. 2504-10, 2511, 2514-15, 2518).

[17] Even the HO did not *expressly* discredit L. Hernandez's undisputed testimony regarding Rosa, given she complained right after it occurred and Petitioner presented no contrary evidence. (HOR 22). Yet somehow the HO inexplicably concluded that Employer still failed to provide sufficient credible evidence of threats. (HOR 23).

if they did not support the Union was "clearly contrary to the Petitioner's goals of obtaining more support." (HOR 21). That is not evidence and there is no Board presumption that threats cannot be made by union agents seeking to gain employee support.

The HO credited Rodriguez over Ramirez simply because Rodriquez, as did Ramirez, testified specifically about the conversation they had, with the only difference being that Rodriguez denied the threat and instead claimed she "wished" employees would be excluded from benefits. (HOR 22). While that does not explain why the HO credited one over the other, the HO critically ignored the fact that, in violation of the sequestration order (Tr. 23-24) , Rodriguez admitted that her purported "understanding" had been most recently "clarified" minutes before she testified by none other than Llarull. (Tr. 2283-84 ("today Carmen clarified that")). Given this gross violation of the HO's order, her testimony is not credible. *See El Mundo Corp.*, 301 NLRB 351, 358 (1991) ("[T]he usual remedy for violation of a sequestration order is to not credit the challenged testimony.") (citing *Zartic, Inc.*, 277 NLRB 1478 (1986)). Notably, neither the HO nor the RD addressed this.

The HO's credibility determinations regarding the Union organizer conversations simply center around who had the more vivid memory of events. That the organizers might remember some specific details, however, does not mean they are credibly testifying as to whether the threats were made.

Last but not least, while what D. Hernandez told Gelardi is undisputed, the HO claims Hernandez "jokingly" made her threat. (HOR 21). Gelardi testified credibly it was serious. (Tr. 598). While D. Hernandez testified it was a joke and, after Gelardi claimed she was discriminating, laughed, there is no record evidence contradicting Gelardi that the threat itself was made in a serious manner or that she took it seriously.

3. Legal Errors

The HO failed to apply the party test, and even under a third party test failed to recognize that the pervasiveness and severity of the threats, both separately and when considered in light of all of the other objectionable conduct occurring at the time constituted sufficient grounds for a new election. *See* Sections I, II(A) and II(B), *supra*. Moreover, the HO misapplied both tests by applying a subjective standard and failing to recognize the Petitioner's obligation to repudiate misconduct when she found that managers allayed the fears of Jones and L. Hernandez, and that Ramirez understood the threats made to her were not legitimate. (HOR 20, 22). *See* Section II(A), *supra*.

While the HO claimed these threats were insufficient to overturn the election under either an agency or third party test, case law demonstrates otherwise. Threats by agents that the Union would not protect pro-Hotel employees or employees who did not support the Union constitute objectionable conduct. *Newport News Shipbuilding & Dry Dock*, 236 NLRB 1470, 1479-80 (1978) (agents telling non-union employees that union would not "stand up and go to bat," could not represent them "as much" as they could union members, and that they would receive "better representation" if he had been in the union constituted a threat). *See also Hunter Outdoor Products, Inc.*, 176 NLRB 449, 459 (1969) (union violated the Act when its shop steward told employees that, if they did not join the union within 60 days, they would be denied raises and paid holidays). Similarly, the Board has found sufficient grounds for setting aside an election where employees were threatened with loss of employment unless they supported the union. *See, e.g.*, *Lyon's Restaurants*, 234 NLRB 178 (1978). The Board even has found objectionable conduct where union agents make vague threats of unspecified reprisals if employees do not support the union. *See Bellagio, LLC*, 359 NLRB No. 128, slip op. at 3 ("if this vote goes through, you're toast" and "[t]he vote is going to go through . . . you better not vote"); *Baja's*

Place, 268 NLRB 868, 868–69 (1984) (union representative's statement that he would "get" an employee opposed to union).

Moreover, Employer has met its burden under the third party standard. Nine separate employees testified to being threatened or witnessing threats made to them or others. And this does not even count threats against Cicutto and Tomasello, and the threats in Objections 8 and 9. In this type of atmosphere, even if the comments cannot be attributed to Petitioner the election should be overturned. *See, e.g.*, *Al Long, Inc.*, 173 NLRB 447, 448 (1968) ("It is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the [e]mployer or to the [u]nion. The significant fact is that such conditions existed and that a free election was thereby rendered impossible."). This is especially true when the threats are combined with the other objectionable conduct here.

Threats were proven by credible witness testimony, Petitioner took no steps to repudiate, and the threats had the tendency to interfere with employee free choice given the number, their severity, the number of employees who witnessed these, and the closeness of the vote. The threats created a general atmosphere of fear and reprisal rendering a free election impossible. The HO and RD should have sustained Objection 7.

F. Objection 8: Elevator and Complaint Threats

Prior to the election, Petitioner agents and supporters told employees in a crowded elevator that those employees who did not support the Petitioner "would get booted out" of the Employer when the Petitioner was elected. Llarull circulated a flyer regarding an unfair labor practice complaint filed against the Employer on behalf of the Petitioner and claimed that the employees whose names were mentioned in the complaint, which included pro-Employer bargaining unit members, would be fired.

1. Summary

About one week before the December election, at around 4:30 p.m., open anti-Petitioner employee Susana Ramos was in the employee service elevator heading down to the ground floor at the end of her shift. (HOR 24; Tr. 1162-63, 1164, 1182-83). When she arrived, she observed many people waiting to get on the elevator. (HOR 24; Tr. 1184). Ramos specifically recalled approximately six employees, who worked the later shift, who were headed to work. (HOR 24; Tr. 1184). Committee Leader Jose Martinez and coworker Xiomara were in the service elevator landing area along with some Ethiopian employees. (HOR 24; Tr. 1184, 1185-86, 1230, 1253). As Ramos was exiting the elevator, an unknown male screamed, in Spanish, "We're going to kick everybody out. We're going to come in and we're going to win and we're going to kick everything out." (HOR 24; Tr. 1186-87, 1239). Xiomara then shouted, "except for Susana because she is my friend." (HOR 24; Tr. 1186). People smiled and laughed and Ramos left. (HOR 24; Tr. 1187). Martinez laughed as well. (Tr. 1254). Ramos admitted she found it funny, because she knew it was not true and she did not care. (HOR 24; Tr. 1240).

Petitioner disseminated a flier regarding a NLRB Complaint and Notice of Hearing (Complaint) filed against Employer in Case 28-CA-149979 *et seq.*, that contained names of various Hotel employees. (HOR 24; Tr. 529-30; ER 27). Shortly after that anti-Petitioner employee Mariscal heard Llarull state in the presence of about six other unspecified employees that everyone whose name was mentioned in the Complaint was going to be fired. (HOR 24; Tr. 530, 533-34; ER 27). That list included several managers, a bargaining unit employee, Status Lead Christina Keeran, and a security guard, Olivia Green. (Tr. 530, 545, 562; ER 27).

The HO claimed Mariscal estimated that this threat occurred sometime around June. (HOR 24; Tr. 559). Given Mariscal's confusion regarding the timing of the alleged threat, the HO did not credit her testimony that such a threat was made. (HOR 24). Even if Llarull made

such a threat, the HO found that the Complaint only named alleged supervisors and/or agents of the Employer, not any bargaining unit employees. (HOR 24). Therefore, if six bargaining unit employees heard such a threat as Mariscal testified, they would not reasonably conclude that they were going to get fired. (HOR 24).

Applying a third party standard, the HO found that even if the statement Ramos reported was made, given she admitted she did not take it as a threat, and the people around her laughed, it was not taken as a threat. (HOR 24-25). Likewise, even assuming Llarull made the comment about the individuals in the Complaint, the RD found insufficient evidence that the persons hearing the comment would reasonably interpret it to mean they could be fired.

2. Factual Errors

First, with regard to the elevator incident, although Ramos thought Xiomara's add-on comment excluding her from termination was funny and knew that the threat was not true, this did not mean that the comment itself was not a threat. (Tr. 1186-87, 1239; HOR 24).

Second, as to the Complaint threat, the HO erred in finding all of the employees named in the Complaint to be supervisors. (HOR 24). Keeran, for one, was a bargaining unit employee, as demonstrated by undisputed evidence that shows she did not engage in any supervisory activities, much less exercise the requisite discretion and independent judgment. (Tr. 532, 561-64, 573-75, 2635, 2647-50).

The HO further erred in his application of the testimony. It defies reason that employees would not reasonably fear that they could be fired based on Llarull's threat that alleged managers listed in the Complaint flier would be terminated. If anything, the notion that Petitioner could have such influence over the Hotel's operations at the management level would be a clear signal to employees that the Union could do much worse to them if they did not support the Union.

Moreover, the fact that Keeran is not a supervisor, but instead a bargaining unit employee, underscores the coercive nature of Llarull's threat.

Again, the HO, as adopted by the RD, implicitly credits Llarull over a credible witness, Mariscal, this time solely "[g]iven Mariscal's confusion regarding the timing of the alleged threat." (HOR 24). Not only is a witness's lack of recollection regarding timing not necessarily enough to discount their testimony, *see* Section II(C)(1), *supra*, it misstates the record. Mariscal initially testified that the flier was issued sometime between June and December 2015. (Tr. 528-29, 532). While she did not remember exactly when, she recalled that it was after the first election was postponed. (Tr. 529). On cross, Petitioner counsel misstated her testimony by stating that Mariscal said that Llarull referred to it sometime in June, and then asked Mariscal questions from there. (Tr. 559). Petitioner counsel did it again on recross. (Tr. 576). Mariscal never actually claimed she saw this in June and, indeed, said it was after the election. Notably, Llarull, when asked similar questions by Petitioner counsel also testified that it was issued in June. (Tr. 2329). Discrediting Mariscal for this and crediting Llarull was an error.

3. Legal Errors

The HO erred by applying a third party standard to Llarull's threats. The HO further erred in relying on Ramos' subjective impressions and employee laughter to find that the witnesses to the elevator threat subjectively did not see it as a threat. *See* Section II(A), *supra*. *See also Battle Creek Health System*, 341 NLRB at 894 ("the test to be applied is 'whether a remark can reasonably be interpreted by an employee as a threat,' regardless of the actual effect upon the listener") (citations omitted). Moreover, while the employee who said it may not be a Committee Leader, Jose Martinez was a Leader and had an obligation to repudiate the threat rather than let it stand. *See Daniel Finley Allen & Co., Inc.*, 303 NLRB 846, 864 (1991) (failure

to repudiate picket line misconduct). By not doing so, he endorsed it. Objection 8 should be sustained.

G. Objection 9: Lamarca Threat

Prior to the election, Union agent and organizing committee member Dave Lamarca threatened an employee wearing a pro-Hotel button that, once the Union was elected, the employee would be laid off from his position because he had no seniority. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

1. Summary

Around 7:30 p.m. on December 3, in the EDR, Committee Leader Dave Lamarca pointed at employee Jose Ascencio's pro-Employer button and said that Ascencio was going to be laid off because he was wearing the button. (HOR 25; Tr. 876-877). Ascencio admitted (which the HO has characterized as being pressed on cross) that Lamarca just came up and made that comment to him out of the blue, that he had never had a conversation with Lamarca before, and that he did not even know Lamarca's name. (HOR 25; Tr. 905). Ascencio had seen him around before, and described him as an English speaker who has white hair, wears glasses, and is around 5'5" or 5'6" tall. (Tr. 905, 908). Later, after describing him to his manager, he was told the man was Dave Lamarca. (HOR 25; Tr. 906-07). Ascencio also was able to identify his photograph at hearing. (Tr. 907, 2722, 2754, ER 45). Ascencio did not "think" Lamarca could do what he claimed, but he also did not know how Committee Leaders worked or how things worked in a Union hotel. (Tr. 909, 924).

The HO, as adopted by the RD, credited Lamarca's denial of ever having such a conversation or telling anyone in the week prior to the election that they were going to get laid off from their job. (HOR 25; Tr. 2198). The HO considered Ascencio's account unreliable because he did not know who made the alleged comment until Ascencio's manager identified

Lamarca. The HO further did not credit Ascencio's testimony because, when Ascencio identified Lamarca's photo at hearing, Ascencio admitted he was only shown one photo by the Employer for purposes of identification, a dated picture of Lamarca when he was hired by the Employer over six years ago. (HOR 25; Tr. 2722-24, 2754-57; ER 45).

The HO further determined that, even if she credited Ascencio's account, Ascencio "knew" Lamarca does not have the ability to lay off any employees, which meant the alleged comment could not reasonably be construed as a threat. (HOR 25; Tr. 908). Applying a third party standard, the HO found that even if Ascencio's testimony were credited, there was no evidence Lamarca had any control over Ascencio's job security, and thus Ascencio could not reasonably believe Lamarca could carry out his threat. (HOR 26). Moreover, the HO claimed that there was a lack of dissemination of the threat.

2. Factual Errors

The HO's claim that Ascencio was "pressed" on cross is inaccurate: Ascencio willingly answered all questions. (Tr. 905). Moreover, the HO's two reasons for not crediting his testimony are insufficient. That Ascencio did not know the man's name before his encounter is simply because he had not met him; it does not go to the credibility of whether the threat was made. As to the second issue, the photo identification, Ascencio did identify him from the photo (Tr. 907, 2722, 2754, ER 45) and also, in his earlier testimony, accurately described the very gentleman who testified. (Tr. 905, 908). He more than adequately identified Lamarca.

3. Legal Errors

The HO errantly failed to apply the party test and applied a subjective analysis. Nonetheless, the HO failed to properly find that Ascencio said that while he did not "think" (as opposed to knowing) Lamarca could do what he claimed, he also did not know how Committee Leaders worked or how things worked in a Union hotel. (Tr. 909, 924; HOR 25). The threat to

lay off is objectionable conduct. *Lyon's Restaurants*, 234 NLRB at 178. *See also Retail Store Employees Union, Local 428*, 204 NLRB 1046, 1052 (1973) (union agents, among other conduct, threatened employees with loss of employment). While this threat was not widely disseminated, in conjunction with other misconduct, it is sufficient to warrant a new election under either a party or third party test. Objection 9 should be sustained.

H. Objection 10: Voter Commitment Sheet

Shortly prior to the election, Union agents and organizing committee members and supporters demanded that employees 1) declare how they were voting; 2) commit to a time and day when they were going to vote; and 3) sign the commitment in a manner that made it appear they were committing to vote "yes" and to do so on the time and date noted. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

1. Summary

It is undisputed that during the period approximately three weeks prior to the election, Petitioner agents and Committee Leaders used election sign-up sheets to get employees to commit to vote. (HOR 26; Tr. 183, 1511-12, 2239, 2333-34; ER 12). At the top of the sign-up sheet, it stated:

> MAKE AMERICA GREAT AGAIN, START HERE!
>
> To Our Coworkers at Trump International Hotel, Las Vegas
>
> We are hard working Trump employees. We are voting yes for our Petitioner because we deserve respect and fair treatment at work, affordable health insurance for our families, job security, fair workloads, a secure retirement and good wages with regular raises.
>
> Together we will make our hotel great. On December 4 and 5, **we will vote yes!**

(ER 12). This list was also used to determine if voters needed transportation. (HOR 26; Tr. 2334-35).

The HO applied a party standard to the organizers and a third party standard to the Committee Leaders and supporters. (HOR 26). The HO found that petitioner polling is not

objectionable, and that there was no coercion or threats with respect to the use of the election sign-up sheets. (HOR 27)

2. Factual Errors

The HO errantly failed to find that, in the weeks leading up to the election, employees were solicited on a daily basis by Committee Leaders as to how and when they were going to vote. (Tr. 1511-12). The HO failed to acknowledge, recognize and address the additional fact that the Committee Leaders' and organizers' persistent interrogation and solicitation of employees to sign a commitment to "vote yes" and commit to when they were going to vote occurred amidst: (i) an atmosphere of inherently coercive and intimidating conduct as set forth in Employer's other Objections including threats of termination, layoff, and lack of representation should the Union prevail; (ii) the photographing and videotaping of anti-Petitioner supporters accompanied in some instances by threats; (iii) the presence of Committee Leaders in the EDR nearly all day, every day, to solicit employees – even within the 24 hours before the election and the day of the election itself when the employer's campaign abilities are restricted (Tr. 2233-35, 2242, 2245-47); and (iv) when it came time to freely exercise their voting rights, employees were forced to walk past Leaders stationed in the elevator landing, near the polls, watching employees going to vote – thus giving the impression they were there to ensure employees voted as scheduled.

3. Legal Errors

The HO again improperly applied a third party test as to Committee Leaders and also failed to take into account the other objectionable conduct that makes this commitment to vote and vote "yes" violative. The HO's finding that petitioner polling is not objectionable, and that there was no coercion or threats with respect to the use of the election sign-up sheets also is misplaced given the factual circumstances here.

While the Hotel acknowledges the historical disparate treatment of pre-election polling by employers as opposed to unions, it disagrees that a double standard should apply, and given the other misconduct occurring during the critical period, this polling was objectionable under any standard. The general rule that employers and unions are not "equally matched with respect to their powers of or opportunities for the exercise of coercion" and that "disparity between the disruptive powers of the employer and those of the union" warrants finding that pre-election polling by a union is not impermissible *per se* is entirely misplaced here. *See, e.g.*, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 364-65 (6th Cir. 1984).

It defies reason that employees should be somehow immune to the coercive effects of the Union's persistent interrogation, surveillance, and pressure that employees sign a "vote yes" agreement – especially when coupled with its threats of what might happen if they did not support the Union – where such conduct would be "inherently coercive" if committed by an employer. *See id.* at 364 (citing *Offner Electronics, Inc.*, 127 NLRB 991 (1960)). Indeed, in the strike context, the Board has found a union's keeping of "scab lists" or lists of crossover's license plates to constitute unlawful interference. *Local 248, Meat & Allied Food Workers*, 222 NLRB 1023, 1024-25 (1976) (union took pictures of crossovers' license plates and posted the names and addresses of crossovers); *Henry Wurst, Inc.*, 187 NLRB 490, 495-96 (1970) (distribution of a "scab list"); *In re General Teamsters, Warehousemen and Helpers Union, Local 890*, 335 NLRB 686-87 (2001) (videotaping temporary replacements and vehicle license plates, coupled with "abusive remarks" and the use of a bullhorn to call out the license plate numbers of cars crossing the picket line). Yet here, where "laboratory conditions" must be maintained throughout the campaign, the Union's similar conduct had an obvious coercive effect. Undoubtedly, numerous employees ultimately voted for the Union after signing the

agreement under such duress, and believed they were ultimately bound to cast a vote in the Union's favor.

Under the reasoning of *Kusan* and its progeny, the Union's constant interrogation and solicitation of employees to sign a "vote yes" agreement on the eve of the election was objectionable under both the party and third party tests. *Cf. Hollingsworth Management Service*, 342 NLRB 556, 558 (2004). The HO's findings otherwise as well as her failure to address the Employer's position that the Leaders soliciting commitments such as Llarull and Blanco, who also were observers, violated the integrity of the polling process are in error, and Objection 10 should be sustained.

I. Objection 14: Tearing of Government Posting

On December 3, 2015, the day prior to the start of the election, Union agent and organizing committee member Llarull almost completely tore down an official government posting regarding the Settlement Agreement resolving Case No. 28-CA-150529 and photographed the result of her actions to make it appear that the Company was not complying with its posting obligations and had no respect for the employee rights set forth in the posting. Such conduct -- which undermines Board processes -- interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

1. Summary

On December 3, shortly after noon, when Cicutto was removing pro-Petitioner fliers from the walls, he inadvertently tore one corner of one page of the Notices which Employer was required to post as a result of the Settlement Agreement in Case 28-CA-150529. (Tr. 992-93, 999; ER 28, ER 8 at 12:16:32.427 - 12:16:39.427). This was brought to management's attention, and the Notice was repaired and reposted with additional tape to make sure it did not fall down. (Tr. 130, 538-42, 995-96; ER 8 at 12:17:45.627 - 12:21:40.226).

After its reposting, however, Committee Leader Llarull proceeded to pry it off the wall so that it was hanging only by one of the bottom corners, in a manner far more blatant and

damaging than what Cicutto had inadvertently done. (ER 8 at 1:49:58.901 - 1:50:23.801). She then proceeded to take at least one photo of it with her cell phone. (ER 8 at 1:50:23.801 - 1:50:31.701; ER 10). Llarull sent that photo to the Petitioner's External Organizing Director Jose Pineda. (Tr. 2017; ER 10; ER 8 at 1:50:31.701 - 1:51:28.801). She remained in the area with her fellow Committee Leaders and then went into the EDR leaving the posting hanging in its damaged state. (ER 8 at 1:51:28.801 - 1:54:24.999). The Notice hung down for about seven minutes and, during that period, a few employees walked by the Notice until Cicutto came across it and reattached the Notice. (ER 8 at 1:51:28.801 - 1:58:35:799). Llarull admitted showing her photo of the partially posted Notice to some of her coworkers. (Tr. 2412).

The HO applied a third party standard. (HOR 31). She found that there was insufficient evidence that the few employees who walked past the torn notice paid attention and that, even if there was such evidence, the Employer failed to provide sufficient evidence that the partially detached Notice rendered a free election impossible. (HOR 31).

The RD agreed, but also added -- notwithstanding the record evidence otherwise -- that the Employer's claims of nefarious purpose by Llarull "is belied by the quick reporting by that Committee Leader and the subsequent re-hanging of the Board notice by the Employer." (DCR 8). Had Llarull "wanted to show employees the Employer did not care about the election process, she thwarted her own efforts." (DCR 8). Thus the RD concluded that Llarull's quick reporting of the torn notice and the quick reposting of the notice by Employer negated any purported intent by the Petitioner or its Committee Leader. (DCR 8).

2. Factual Errors

The RD's claims that Llarull, after she tore down the Notice, then reported the torn Notice to management is in error. The RD seems to confuse what Llarull did with the initial accidental tearing of a corner of the Notice, in which another employee, Dora Lopez, removed

the poster and took it -- with Llarull following in her wake -- to housekeeping management for reposting. (Tr. 537-538, 993-95). It was after the sign was reposted that Llarull then tore it down -- not just one corner but three corners -- and left it hanging. (ER 8 at 1:49:58.901 - 1:54:24.999). She did not report that to anyone and, indeed, throughout the hearing she denied tearing the poster in the face of video proof. (135-36, 138-39). Nor did the employer re-post it; Cicutto did when he saw it had been torn. (ER 8 at 1:51:28.801 - 1:58:35:799).

3. Legal Errors

The HO erred by applying third party standard instead of the party test. *See* Section II(A), *supra*. The HO further erred by finding there was insufficient dissemination of this conduct, given the HO's own recognition that: (i) there was video evidence that employees walked past the torn notice; and (ii) Llarull showed the photo to coworkers. (HOR 31). This dissemination is more than sufficient to sustain this Objection. Moreover, when this dissemination is looked at in conjunction with the dissemination of the other misconduct objected to, there is more than sufficient dissemination of misconduct to warrant a new election.

The HO further erred in alleging that this conduct did not interfere with the election. (HOR 31). Section 10(c) of the NLRA authorizes the Board to issue an order requiring a party who has engaged in an unfair labor practice to "to take such affirmative action … as will effectuate the policies of the Act." One of the affirmative actions invariably required is the effective posting of a remedial notice.

The Board has long emphasized the importance of the effective posting of such notices and in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 13 (Oct. 22, 2010) (in which the Board modified the notice-posting requirement to include possible electronic distribution/posting) had occasion to explain the reasons underlying the requirement of effective notice posting.

> The requirement that respondents post a notice informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act. See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935), enf. denied in relevant part 91 F.2d 178 (3d Cir. 1937), rev'd., 303 U.S. 261 (1938). Remedial notices serve a number of important functions in advancing the Board's mission of enforcing employee rights and preventing unfair labor practices. They help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur. See generally *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399-401 (D.C. Cir. 1981). See also *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (purpose of remedial notice is to convey to employees information about their rights and the employer's obligation not to interfere with those rights); *Chet Monez Ford*, 241 NLRB 349, 351 (1979), enf'd. mem. 624 F.2d 193 (9th Cir 1980) (notices are "a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices"). They also serve to deter future violations. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (the requirement to "conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices" is a "significant sanction"). In order to achieve these remedial goals, notices must be adequately communicated to the employees or members affected by the unfair labor practices found.

Id., slip op. at 2.

Llarull's intentional actions undermined two of the purposes behind the notice posting requirement, specifically "to provide assurances that future violations will not occur" and "to convey to employees information about their rights and the employer's obligation not to interfere with those rights," *supra*, to the potential advantage of the Union. There is simply no benign reason for Llarull to send the picture of her handiwork to her coworkers (much less the Union). The RD's attempt in his decision to negate her nefarious actions simply fails due to the lack of evidence. (DCR 8).

Had the Hotel intentionally done what Llarull did, it would, of course, have undermined all of the reasons behind the posting requirement enumerated in *Picini*. But, in particular, such

contemptuous conduct would have sent the message that employees could not be assured that violations would not occur in the future or that the employer acknowledged its obligations not to interfere with Section 7 rights. Llarull's intentional actions had the potential for creating the impression in employees, who were as likely as not to infer that the interference with a posting that ran against the Hotel was in fact the handiwork of the Hotel, that the Hotel did not respect their rights, was prepared to ignore their rights in the future, and, therefore, that they needed to vote in favor of the Union to secure its protection of their rights.

The creation of the appearance that the Employer is tearing down notices in complete disregard of the law interferes with laboratory conditions. Anyone who has the *slightest* familiarity with union organizing drives knows that one of the recurring union themes is that employees need union representation to protect their rights, including rights protected by federal laws governing the workplace. Further, the Board has acknowledged this is a legitimate union role. For example, in *Caterpillar Inc.*, 361 NLRB No. 77 (Oct. 30, 2014), *enf'd.* 803 F.3d 360 (7th Cir. 2015), in a post-*Noel Canning* de novo review of its earlier decision, the Board affirmed (with modifications immaterial here) that a union was entitled to enter the employer's premises to independently investigate a workplace fatality notwithstanding an OSHA inspection.

Having intentionally interfered with the Hotel's posting obligations, Llarull created a false impression of employer contempt for its statutory obligations that could reasonably lead employees to conclude that the Union was needed to uphold their rights. Such intentional misconduct should be objectionable.

Finally, in order to uphold the integrity of its remedial processes, the Board should hold as a matter of policy that the intentional interference with a remedial posting during the election period by a party is grounds for setting aside an election won by the offending party. Regardless,

under the party test the conduct was objectionable. Even under a third party test, Llarull's actions in conjunction with the other Objections raised by Employer were more than sufficient to warrant a new election.

IV. EVEN ASSUMING A LACK OF AGENCY, THE HO/RD ERRED BY NOT ORDERING A NEW ELECTION UNDER A THIRD PARTY MISCONDUCT STANDARD.

Even errantly applying the third party standard instead of the party standard, the HO, as approved by the RD, erred in overruling Employer's objections. The HO failed to consider the totality of circumstances under which the Union, its representatives, observers, supporters, and Committee Leaders created a general atmosphere of confusion, threats, interrogation, surveillance, improper electioneering, and misrepresentations, which interfered with the free choice of voters and tainted the election results. *See, e.g.*, *Great Atlantic & Pacific Tea Co.*, 177 NLRB 942, 942-43 (1969).

Throughout the lengthy campaign, Committee Leaders and Union supporters threatened employees with termination, layoffs, lack of protection, arrest, and reporting them to government agencies. *See, e.g.*, *Lyon's Restaurants*, 234 NLRB at 178 (setting aside an election where employees were threatened with loss of employment unless they supported the union); *Hartman and Tyner, Inc.*, 361 NLRB, slip op. at 1 (employer threatening employees with arrest violated the Act); *Q. B. Rebuilders*, 312 NLRB 1141, 1142 (1993) (finding a sufficient level of fear to set aside the election based on a third-party employee threat to call the INS to report any employee who voted against the union); *Westwood Horizons Hotel*, 270 NLRB 802, 803-04 (1984). Employees were also subjected to unyielding surveillance, interrogation, and coercion. Committee Leaders took numerous photos and videos of employees without the employees' permission and without providing any legitimate justification. *Randell II*, 347 NLRB at 591. Even employees seeking to exercise their right to vote in the election were forced encounter

surveillance by Committee Leaders and other individuals in the Hotel's service elevator landing within feet of the voting area. *See Nathan Katz Realty*, 251 F.3d at 981. The Committee Leaders frequently interrogated employees about their Union sympathies, carefully monitored who supported and did not support the Union, and tried to get employees to sign agreements to vote for the Union on a particular date and time.

Lastly, the day before the election Committee Leader Llarull almost completely tore down the settlement poster, left it hanging there for all to see, and shared the photo of her handiwork with coworkers – giving the appearance that the Employer did not respect the Board or employee rights under the Act.

In sum, even applying a third party standard, the HO errantly failed to find that the totality of the Union's and the Committee Leaders' conduct throughout the critical period created a generally intimidating and coercive atmosphere, such that "might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representation." *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1954).

V. ADDITIONAL EXCEPTIONS

A. The Region Erred in Refusing to Add the TCPA Objection

1. Summary

Union Director of Communications Bethany Khan, called by Petitioner, testified that the Union mass texted over 300 employees, including those that provided authorization cards, those whose cell phone numbers fellow coworkers provided, *and* additional individuals from the *Excelsior* list that the Employer provided in accordance with the Board's Rules. (Tr. 1714, 1732-33, 1871; P6). The Union introduced a complete copy of all the texts sent. (Tr. 1830, 1873-74; P6). Khan also admitted she was legally required to obtain permission from the employees to text. (Tr. 1868).

Upon hearing Khan's testimony, the Employer requested to add an objection that the Union's mass texting of employees without obtaining prior consent violated the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 *et seq.* (TCPA). (Tr. 2269). The RD decided not to allow the Employer to make this additional objection. (Tr. 2273-27).

In the DCR, the RD reiterated that parties may not amend objections or file additional objections after the end of the seven-day filing period, and that the RD is not authorized by the Rules to extend the time for filing objections. (DCR 9).

2. The RD Erred By Not Considering the TCPA Violation

The RD erred in his interpretation of his authority, and erred by not allowing the objection to proceed. An employer may not have the right to file further objections and the RD cannot necessarily extend the time frame for filing, but even the cases the RD cites expressly recognize and acknowledge that RDs have certain discretion in this area, and that "[t]he interest in insuring the employees were not coerced also warrants the Regional Director's consideration of unrelated misconduct, unknown to the objecting party at the time the objections were filed, the existence of which comes to its attention while the Regional Director is conducting is investigation." *Burns Int'l Sec. Servs., Inc.*, 256 NLRB 959, 960 (1981); *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984) (Board will consider newly discovered and previously unavailable evidence of misconduct).

The Region thus is not handcuffed to objections as specified. The RD has the power to consider unlawful activity that is discovered in the course of the hearing. *Presto Mfg. Co.*, 168 NLRB 1073, 1074 (1968) (while the RD went beyond the objections filed, "it has been held that despite the provisions of Section 102.69 of the Board Rules and Regulations . . . concerning details and time for filing objections, he may thus act *sua sponte* to set aside the election."); *Morganton Dyeing & Finishing Corp.*, 154 NLRB 404, 418 n.26 (1965) ("I cannot agree that the

[RD], as a public official charged with responsibilities in connection with enforcement of the Act, is without power to set aside an election for conduct violative of the Act unless it is expressly raised by a party's formal objections. [I]t is well established that the jurisdiction of the [RD] in making a post-election investigation is not limited to the issues raised by the parties.") (internal citations omitted).

It admittedly is unclear how a RD's discretion may be impacted under the new Rules, wherein no investigation is conducted beyond reviewing an offer of proof to determine whether to conduct a hearing. But the principle behind the Board's case precedent, that the RD charged with enforcement of the Act should have the power to correct misconduct regardless of whether it has been raised as a formal objection, remains. Moreover, it is important to note that the misconduct at issue was elicited from the testimony of Petitioner's witness. Such information was unknown to Employer until it came to light at hearing, and it is hard to conceive how Employer could have ever known the inner workings of the Petitioner's Communications Department prior to this witness testifying. This was a door Petitioner opened in its desire to address how broadly it communicated with employees. The RD had every right to consider this new evidence.

The RD not only erred by failing to recognize that he could consider this new evidence, but he erred by not taking it into consideration and deciding to overturn the election. After all, the primary objective of the Board is to make certain that elections are conducted fairly and properly. *House of Mosaics, Inc.*, 215 NLRB 704, 708-09 (1974) (citing *Edward J. Schlachter Meat Co., Inc.*, 100 NLRB 1171 (1952) (setting aside an election in the absence of a union's filing of objections and noting " . . . the primary objective of the Board is to make certain that every election held under Board auspices is conducted fairly and properly, and that the results

represent freely expressed desires of employees, we must, on our own motion occasionally investigate and consider allegations of interference . . . regardless of how the matter comes to our attention.")).

The Union violated the TCPA. The TCPA only permits mass text messages when the texting agency has obtained prior express consent, and only provided that there is an option for the individual to opt out in each text, after that individual has provided express consent. 47 C.F.R. § 64.1200(b)(3).[18] Here, the record already reflects that the Union used employee cell numbers it obtained solely from the *Excelsior* list and texted them without the employees having provided any prior express consent. The texts, with two exceptions, also fail to provide an after-the-fact opt out. (P6).

This is a novel issue since the new Board Rules require employers to produce cell numbers. However, in Memorandum GC 15-06 (April 6, 2015), guidance is offered on the new Rules, including with respect to the voter list. The Memorandum notes "that parties shall not use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." (GC 15-06, p. 35). Among the examples of a violation of this restriction is the "using of the list to harass, coerce . . . employees." (*Id.* at p. 36; footnote omitted). It is fair to state that one of the central purposes of the restrictions imposed by the TCPA was to prohibit the harassment of citizens by calls that Senator Fritz Hollings, the bill's original sponsor, described as a "nuisance and an invasion of our privacy." (Congressional

[18] Calls include text messages. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003); *see also* FCC Enforcement Advisory No. 2012-06, 2012 FCC LEXIS 3863, at *13-14 (Sept 11, 2012). *See, generally, Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call" under the TCPA).

Record – Senate Proceedings and Debates of the 102nd Congress, First Session, July 11, 1991, 137 Cong. Rec. S9840, S9874).

Although Employer acknowledges that the mass texting at issue was for purposes related to the representation proceeding, the use of the list in a manner that violates the TCPA cannot be seriously argued as permissible under the Board's Rules. In order to effectuate Congressional intent and to require that parties meet their legal obligations under the TCPA, as well as to insure parties do not misuse voter lists provided pursuant to the Board's Rules, the Employer urges the Board to consider this violation and to adopt a *per se* rule that the use of a Voter List in violation of the TCPA is grounds for setting aside an election won by the party violating the TCPA. The Board should not condone the actions of any party using information provided under Board auspices to violate federal law.

B. The HO Erred in Limiting Employer's Subpoenas Duces Tecum

1. Summary

On December 23, 2015, Employer subpoenaed the Union and Llarull,[19] to which the Union and Llarull petitioned to revoke. (Tr. 2821-22, Bd 2). After compromises by both parties, the HO had to resolve the petition only as to Subpoena paragraph 4, where Employer sought photographs or recordings, audio and video, digital or electronic, taken or possessed by the Union (and Llarull in her subpoena), its employees or representatives, committee leaders, election observers, and/or Union agents, of any Hotel employees while on the Hotel's premises; and that were taken three weeks prior to the election, including in the EDR, guest rooms, parking lot, valet area or any working or non-working area. (BD 2). The request was primarily related to Employer Objection 13, in which Employer alleged that shortly before the election, Llarull and

[19] Subpoena Numbers B-1-PMLE0J and B-1-PMLDKZ.

others engaged in surveillance, photography, and in some instances recorded pro-Hotel employees in the EDR and other areas of the Hotel without their permission. (Bd 1).

Employer agreed to limit its request to seek only photographs or recordings taken or possessed by the Union or by Llarull of employees engaging in anti-Union activities or that were demonstrably anti-union, such as wearing pro-Hotel buttons. (Tr. 2824). Petitioner opposed this request, but was agreeable only to producing photographs and recordings if Employer presented evidence of the taking of those photographs and recordings as part of its case at hearing. (Tr. 2825).

The HO limited Paragraph 4 as the Union proposed, finding that Employer was only entitled to materials related to the conduct that formed the basis for its objections – *i.e.*, that the discrete instances of photographing or recording testified to constituted all of photographs or recordings that could be relevant. (Tr. 2841). The HO found that the production of photographs or recordings taken on other occasions about which the Employer has not presented evidence would allow it to discover conduct of which it was not aware when it filed its objections, and thus conduct that did not form part of the basis for its objections. (Tr. 2841-42).

The RD upheld the HO, finding without citing a single case that by requesting all photographs and recordings made or possessed by the Petitioner that show anti-Union employees at work in the three weeks prior to the election, the Employer was engaged in a fishing expedition. (DCR 9).

2. The RD Erred By Refusing to Enforce the Subpoena

The RD basically deprived Employer of its right to discovery to find additional support for objections it properly made and were part of this hearing. The RD, without any case precedent, prevented the Employer from obtaining evidence necessary to prove its case.

The RD and the HO errantly redefined relevancy. A subpoena may be revoked if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." NLRB Rules § 102.31(b); *see also* NLRB Guide For Hearing Officers at 21 ("information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry.").

Yet here the HO, as supported by the RD, redefine relevance not as whether it relates to any matter under investigation or in question, but whether it relates to anything Employer can already prove happened without having had the subpoenaed evidence produced. That, however, is not what the regulations provide, or how "relevance" is defined. NLRB Guide For Hearing Officers, at 33-34 (citing Fed. R. Evid. 401, states evidence is relevant "if it has a tendency to make more or less probable a fact of importance to the issue under consideration."). *See also Cooking Good Div. of Perdue Farms, Inc.*, 323 NLRB 345, 348 (1997) (FRE provides "significant guidance with respect to relevance."). Notably, courts have rejected attempts to deprive a party of such relevant evidence. In *Ozark Auto Distributors v. NLRB*, 779 F.3d 576, 583-85 (D.C. Cir. 2015), the court outright rejected questions regarding the relevance or need for evidence of phone calls between the union and putative agents, because the documents related to a matter in question, might provide leads to other evidence, and went to the credibility of the witnesses. Hence, the court concluded that the granting of the Union's petition to revoke was prejudicial, reversible error because obtaining the records would have given the employer critical opportunities that it otherwise lacked in putting on its case. *Id.*

Moreover, the RD and HO turned the process on its head. Employer alleged in its objections and *demonstrated* multiple employees (*e.g.*, Tomasello, Cicutto, Gonzalez, Ramos, Ascencio) were subject to being photographed and/or videotaped by a number of Committee Leaders (*e.g.*, Llarull, Vargas, Menjivar). Yet, despite the fact the unit involved had 523 employees, many of whom Employer believes felt coerced and intimidated by such surveillance, Petitioner was allowed to refuse to produce additional evidence of objectionable conduct simply because other employees did not come forward. That is a deprivation of due process and a perversion of the judicial process.

Employer's subpoena also goes to credibility because Union witnesses denied taking other photos and video. Additionally, the extent to which such conduct occurred goes to the severity of the conduct and to dissemination sufficient to warrant a new election. While Region Counsel Smith believed Employer had produced sufficient evidence of the photographing, and that any additional evidence would be cumulative (Tr. 2837), the HO clearly disagreed as applying her third party test she declined to find an atmosphere of fear and reprisal, and she found insufficient dissemination beyond the actual employees photographed. (HOR 17-18). Hence, denying Employer access to the additional evidence was clearly prejudicial. The HO erred in granting the petition to revoke, and the RD erred in upholding that decision.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Employer requests that the Board review the RD Decision and ultimately decide to sustain the Employer's election objections, revoke the certificate of representation, and order a new hearing.

April 4, 2016 Respectfully submitted,

TRUMP RUFFIN COMMERCIAL LLC, d/b/a TRUMP INTERNATIONAL HOTEL LAS VEGAS

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CERTIFICATE OF SERVICE

I do hereby certify that I caused a true and correct copy of the foregoing EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE to be served upon the following, via the NLRB's e-filing system and email on this 4th day of April, 2016:

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ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAKER DC, LLC
Employer

and

Case 05-RC-135621

OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 891
Petitioner

ORDER

The Employer's Requests for Review[1] of the Regional Director's Supplemental Decision and Second Supplemental Decision are granted with respect to Employer Objection 2 (surveillance), which raises a substantial issue warranting review with respect to that Objection. The Requests for Review are denied with respect to Employer Objection 3 (electioneering).

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
LAUREN McFERRAN,	MEMBER

Dated, Washington, D.C., December 28, 2015.

[1] Although the Employer has filed its submissions as exceptions, we will treat them as requests for review, pursuant to the Board's Rules and Regulations, Section 102.69(c)(4).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
BAKER DC LLC,	:	Case No. 05-RC-135621
Employer	:	
And	:	
OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION LOCAL 891,	:	
Petitioner.	:	

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL DECISION ON OBJECTIONS TO THE ELECTION

Baker DC, LLC ("Baker" or "Employer"), by its attorneys, hereby submits its brief in support of exceptions to the Regional Director's Second Supplemental Decision On Objections To The Election issued on June 26, 2015, pursuant to Section 102.69 of the Board's Rules and Regulations.

The sole issue presented by the Second Supplemental Decision is whether actions of union officials positioning themselves at and near the entrance to the lobby of the otherwise empty office building where the election was being held, at a place where the voting employees had to pass in order to vote, constituted objectionable surveillance for which the election must be set aside. The Regional Director failed to address this objection in his initial Decision on the Employer's objections, leading the Employer to

file exceptions from that Decision on December 9, 2014. While those exceptions remain pending before the Board, the Regional Director *sua sponte* issued a Second Supplemental Decision specifically to address Objection 2, which he characterized as a "reconsideration" of the previous Decision that had failed to address the surveillance issue.

In the Second Supplemental Decision, the Regional Director has again recommended that Objection 2 be overruled, on the ground that the Union representatives were too far from the polling area or any voters in line to vote to constitute objectionable surveillance. Supp. Dec. at 2-3. To the contrary, cases cited by the Employer establish that elections should be set aside when union officials station themselves in an area where voting employees "must pass" on their way to vote, regardless of the distance to the polls themselves. *See Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), citing *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982); *Performance Measurements Co.*, 148 NLRB 1657 (1964).

In *Nathan Katz Realty*, the Regional Director attempted to distinguish *Electric Hose* on the same ground as the present Decision, *i.e.*, that the union agents were in a car across the street from the voting area, not "immediately outside" the actual polling area. The D.C. Circuit rejected this argument, as follows:

> This distinction is manifestly inadequate. In *Electric Hose*, only one of the supervisors stood immediately outside the polling area. The other two supervisors simply stood in an area where employees "had to pass in order to vote." Nothing in the *Electric Hose* decision indicates that these two supervisors were anywhere near the actual polling place.
>
> * * *

> Together, *Electric Hose* and *Performance Measurements* seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote.

251 F.3d at 992-993.

In the present case, it is undisputed that a group of union officials stood at or near the entrance to the building lobby and that all employees had to pass a few feet from the union agents in order to vote. The fact that the polling area was a short elevator ride above the lobby is irrelevant to the proper determination of this surveillance objection. The election was held at an early hour (5:30 am) when the building was otherwise closed and empty, and there was only one way for the voters to gain access to the polls, through the lobby entrance where the union officials were congregated. It is also irrelevant that the lobby had not been declared a "no electioneering" area, just as that fact was irrelevant in the above referenced cases. Objection 2 objects to unlawful surveillance, not unlawful electioneering. The case law is clear that the union actions in the present case constituted unlawful surveillance and the election must therefore be set aside.

Respectfully submitted,

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July 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served by electronic mail on the following this 10th day of July, 2015:

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